## APPENDIX A — OPINION OF THE SUPREME COURT OF MISSISSIPPI DATED FEBRUARY 4, 1999

**John Wilbur McFADDEN, Jr., M. D.**

**v.**

**MISSISSIPPI STATE BOARD OF MEDICAL LICENSURE.**

**No. 97-CC-01410-SCT**

Supreme Court of Mississippi.

Feb. 4, 1999.

* * *

BEFORE SULLIVAN, P.J., and McRAE and JAMES L. ROBERTS, Jr., JJ.

SULLIVAN, Presiding Justice, for the Court

STATEMENT OF THE CASE

¶ 1. This is an appeal from the October 14, 1997, judgment of the Hinds County Chancery Court affirming the November 22, 1996, decision of the Mississippi Board of Medical Licensure suspending Dr. McFadden's medical license indefinitely but automatically staying the suspension subject to numerous probationary conditions that severely restrict, or in some circumstances, prohibit his privileges to prescribe controlled substances.

*Appendix A*

## STATEMENT OF THE FACTS

1. Dr. McFadden

¶ 2. Dr. McFadden is a physician licensed to practice medicine in the State of Mississippi, currently holding License No. 05129. Dr. McFadden considers himself a specialist in the treatment of severe, chronic pain. He is a founding member of the Southern Pain Society and the American Academy of Pain Medicine. Dr. McFadden has written on the treatment of pain and has lectured in the United States and abroad on the subject.

2. Records Seized

¶ 3. In March 1996, investigators with the Board of Medical Licensure visited Dr. McFadden's clinic in Tupelo, Mississippi, in order to execute an administrative inspection and search warrant.. The search warrant, obtained pursuant to the Uniform Controlled Substances Act, Miss.Code Ann. § 41-29-101 et seq., permitted the investigators to obtain and review the medical records of selected patients under Dr. McFadden's care. Following routine prescription profiles of pharmacies in the Tupelo area, thirty six patients had been identified as receiving usually large quantities of controlled substances through prescriptions issued by Dr. McFadden. The investigator presented four of these patient files to the Board for review at the November 21 and 22, 1996 hearing on this matter. The patient files presented were those of Dwight Kee, Priscilla Lovelace, Jeffrey Gilmore, and Jackie Tate.

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3. Background Facts

¶ 4. In its affidavit for the administrative inspection and search warrant, the Board asserted the following underlying facts establish probable cause for the March 1996 search and seizure of Dr. McFadden's patient files:

a. In March 1997, Dr. McFadden was investigated by the Board for issuing suspicious amounts of prescriptions for Codeine based products and diet pills.

b. In June 1987, he was investigated for excessive purchases of Schedule III controlled substances and issued a Letter of Admonition by the United States Drug Enforcement Administration (DEA) for numerous violations of state and federal controlled substance law.[1]

c. In February, 1989, the Board received a complaint from the Amory, Mississippi Police Department concerning Dr. McFadden prescribing large quantities of Propoxyphene to known drug abusers in the Amory area.

d. In December 1991, pharmacy profiling by the Board documented suspicious quantities of Codeine, Hydrocodone and Propoxyphene prescriptions being issued by Dr. McFadden to patients in the Tupelo area.

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1. In April 1988, a follow-up inspection to the DEA investigation revealed that all corrective measures outlined in the letter of admonition were identified as being maintained by Dr. McFadden.

Many of these patients were suspected or known drug abusers.

e. In April 1992, investigators performed a review of selected patient files identified as receiving suspicious quantities of controlled substances prescriptions from Dr. McFadden. Seven patient medical files were reviewed. All patients were identified as having some type of drug use/abuse. Several patients were noted as receiving suspicious amounts of controlled substances for long periods of time. In addition, many of the prescriptions issued were not properly documented in the charts. Investigators also conducted a follow-up inspection to an audit and inspection performed by the Board and the DEA in 1988. As a result of this visit, the Board's previous Executive Officer Frank J. Morgan, Jr., M.D., contacted Dr. McFadden in writing warning him to properly document patient records and monitor patients who exhibit symptoms of chemical dependency. The letter also warned Dr. McFadden that his prescribing habits would continue to be monitored by the Board.

f. In April 1995, the Board was contacted by a member of the Lee County Sheriff's Department concerning Dr. McFadden issuing narcotic prescriptions to known drug abusers.

g. Also in April 1995, the Board was contacted by the Tupelo Police Department concerning a possible diversion of controlled substance samples from Dr. McFadden's clinic. Dr. McFadden was described as

reluctant to cooperate with the police officers in their investigation of the theft.

4. The Complaint

¶ 5. The current charges against Dr. McFadden are set forth in an 11-count affidavit or complaint. Specifically, the Board charges Dr. McFadden with (1) failing to maintain complete records of examination, evaluation, and treatment of patients, including the alleged failure to document a diagnosis that would justify prescribing controlled substances; (2) prescribing controlled substances without a good faith examination of the patients; (3) prescribing addictive medications "otherwise than in the course of legitimate professional practice"; and (4) unprofessional conduct, including "conduct likely to deceive, defraud or harm the public."

5. The Board Hearing

¶ 6. On November 21 and 22, 1996, Dr. McFadden appeared before the Board. The Board's witnesses included the investigator, Mr. Thomas Washington, and a neurosurgeon, Dr. Bernard Patrick. After counsel for the Board rested, Dr. McFadden moved for a directed verdict, but his motion was denied. Dr. McFadden's witnesses included Dr. McFadden, Dr. George McGee, Dr. David McKellar, Dr. Daniel Brookhoff, and three of the four patients whose files were presented to the Board.

¶ 7. The testimony offered by the investigator, Mr. Washington, centered on a description of his search and a

recitation of the information stated in the affidavit for administrative inspection and search warrant. On cross examination, Mr. Washington admitted he did not interview any of Dr. McFadden's patients and he did not speak with Dr. McFadden about any of his patients.

¶ 8. Dr. Patrick appeared as the Board's expert witness. Asked his opinion as to the proper management of chronic pain, Dr. Patrick stated he prefers to limit the patient's movement and, when necessary, use chronic medications preferably in the category of the nonsteroidal anti-inflammatory agents. Dr. Patrick further testified that patients who often have recurring exacerbations may require short term opioid[2] medications. He also stated that in his experience, patients with pain of spinal or vertebral origin seldom require the stronger opioid medications (such as Morphine and Demerol) and only then for a day or two. Dr. Patrick also testified that the overwhelming majority of patients who need short term opioid therapy can be treated with Codeine or Codeine-equivalent drugs such as Oxyhcodone and Hydrocodone. He added that it is quite rare that such patients require chronic opioid medications for a prolonged period of time.

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2. "Opioids" constitute a class of natural and synthetic substances used medicinally to control pain. Although the term was originally used to refer only to synthetic compounds chemically similar to the natural opioids, such as methadone, current usage includes natural substances derived from the sap of the opium poppy, such as morphine and codeine. See Marc Galanter & Herbert Kleber, Textbook of Substance Abuse Treatment 191 (1994) (editors' note).

¶ 9. Dr. McFadden testified that he regularly uses opioids in the treatment of patients with intractable pain. Dr. McFadden insisted that, contrary to what is charged in the complaint, he made a prior determination when nonaddictive substances would be effective. Dr. McFadden also stated that all medications were prescribed to his patients in the course of legitimate professional practice.

¶ 10. Dr. McGee, a general surgeon, serves on the Advisory Council for the American College of Surgeons, as Vice Chair of the Council on Managed Pain and Development, as Speaker of the House of Delegates at the Mississippi State Medical Association, and previously as Speaker of the House of Delegates for the American Society of General Surgeons. Dr. McGee described Dr. McFadden as a trustworthy physician who takes meticulous care of his patients.

¶ 11. Dr. McFadden also offered the expert testimony of Dr. McKellar, a pain medicine specialist. Dr. McKellar testified that he regularly prescribes opioids for patients in intractable pain. Dr. McKellar also testified that he had reviewed the four patient files at issue, and in his opinion, Dr. McFadden's prescription of controlled substances for these patients was done in the course of legitimate medical practice. Dr. McKellar further testified that his review of the patient files revealed that Dr. McFadden had carefully monitored these patients and that the patients appeared to have suffered no harm under Dr. McFadden's care. While Dr. McKellar admitted he had not examined these patients, he stated that a review of the four patient files indicated that Dr. McFadden's treatment and evaluation of these four

patients was reasonable and that Dr. McFadden had conducted a good faith examination of these patients. Dr. McKellar also stated that he thought Dr. McFadden's level of referrals to other doctors for alternative treatments indicated an admirable level of professionalism.

¶ 12. Dr. Brookhoff, another pain medicine specialist, also testified on behalf of Dr. McFadden. Dr. Brookhoff is board certified in internal medicine and medical oncology. He conducts frequent seminars and other meetings on pain management, has published numerous medical journals, and has written several book chapters concerning the treatment and management of pain. Like Dr. McKellar, Dr. Brookhoff examined the four patient files at issue. Dr. Brookhoff testified that in his opinion, Dr. McFadden's treatment of these patients was "in the course of legitimate medical practice," and it did not appear that any of these patients suffered any physical harm as a result of the controlled substances prescribed by Dr. McFadden. Dr. Brookhoff stated that it was his professional opinion that the controlled substances prescribed by Dr. McFadden were not excessive and that, for the most part, the medications prescribed by Dr. McFadden were very low potency medications. According to Dr. Brookhoff, Dr. McFadden's practice of referring patients to other physicians for second opinions and alternative or supplemental treatment suggests that Dr. McFadden was open to receiving advice and assistance from colleagues and that he was not keeping any secrets.

¶ 13. Three of the four patients at issue also testified at the hearing. Priscilla Lovelace, a charity patient who suffers from a lower back injury, testified that Dr. McFadden

is an attentive doctor and that without his treatment, she "would continue using the emergency rooms to seek relief."

¶ 14. Jackie Tate testified that he suffers from constant pain in his right leg and his back, but other doctors are afraid to operate at his time for fear it may worsen his condition. Mr. Tate testified that Dr. McFadden has referred him to other doctors and that Dr. McFadden monitors his medications, counsels him, and personally examines him approximately every six weeks.

¶ 15. Dwight Kee testified that he suffers from back pain which radiates down his right arm, numbness in his fingertips, neck pain and severe headaches. According to Mr. Kee, he has seen orthopedists, neurologists, pain specialists, psychiatrists, internists, as well as, his family doctor in an attempt to obtain some relief. Mr. Kee stated that he talks with Dr. McFadden on the average of twice a week and that Dr. McFadden has made home visits to see him when necessary.

¶ 16. Mr. Kee further testified that parts of the affidavit which suggest he misused his medications were false. Mr. Kee stated that he once had a two week meeting in Chicago, and consequently, it was necessary for him to obtain sufficient medication from Dr. McFadden for the trip. Mr. Kee also refuted the charge in the affidavit stating that Dr. McFadden placed him on a regimen of controlled substances without a prior determination that nonaddictive substances were ineffective. Mr. Kee explained that he had tried various non- controlled substances before he was prescribed controlled substances by Dr. McFadden. Mr. Kee concluded

his testimony by stating that he received better treatment from Dr. McFadden than most doctors he had seen.

6. The Board's Order

¶ 17. Following the evidentiary hearing, the Board unanimously found Dr. McFadden guilty of the following:

> Three counts of violating Section 73-25-29(1)(m) and appellee's Rules and Regulations, Section IV.E "Pertaining to Prescribing, Administering and Dispensing of Medication," for failing to maintain a complete record of the examination, evaluation, and treatment, including documentation of the diagnosis and reason for prescribing controlled substances;
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> Four counts of violating Section 73-25-29(1)(m) and appellee's Rules and Regulations, Section IV.F "Pertaining to Prescribing, Administering and Dispensing of Medication," for prescribing a controlled substance or other drug having addiction-forming or addiction-sustaining liability without a good faith examination or medical indication thereof; and
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> Four counts of violating Section 73-25-29(1)(c), Section 73-25-29(1)(h)(iv), and Section 73-25-83(a) for prescribing drugs having addiction-forming or addiction-sustaining liability, otherwise than in the course of legitimate professional practice and being guilty of unprofessional conduct, which includes dishonorable or unethical conduct likely to deceive, defraud or harm the public.

For these violations, the Board suspended Dr. McFadden's medical license indefinitely, subject to an automatic stay conditioned on the following probationary terms:

> No permission to order, manufacture, distribute, possess, dispense, administer or prescribe any controlled substances listed in Schedules II, IIN, III, IIIN, and IV to any patient on an out-patient basis, until authorized to do so by prior written order of the Board, except for emergency-room treatment on condition that Dr. McFadden personally examines the patient and makes a determination as to the need thereof;
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> No permission to order, manufacture, distribute, possess, dispense, administer or prescribe the medications Stadol, Nubain, Soma, Butalbital, and Dalgan to any out-patient, until authorized to do so by prior written order of the Board, except for emergency room treatment (as above);
>
> Compliance with all federal, state and local law regarding the practice of medicine, and the Board's rules pertaining to prescribing, administration and dispensing of medication;
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> Periodic surveillance of Dr. McFadden's medical practice by the Board;
>
> Continuing medical education (50 hours annually), including the course entitled "Physician Education Program in Clinical, Legal and Ethical Issues in Prescribing Abusable Drugs," sponsored by the University of South Florida; and

Ten days' notice if Dr. McFadden leaves Mississippi to reside or practice elsewhere.

¶ 18. The Board's Order further provides Dr. McFadden with the right to petition the Board to release any or all of these probationary conditions after November 22, 2001, and states Dr. McFadden retains full privileges to prescribe controlled substances in Schedule V, with the exception of Buprenex.

¶ 19. Dr. McFadden appealed the Board's decision to the Hinds County Chancery Court. After the Chancery Court affirmed the Board's decision, Dr. McFadden brought the instant appeal raising two issues for the Court's consideration:

I. WHETHER THE DECISION OF THE BOARD WAS SUPPORTED BY SUBSTANTIAL EVIDENCE FOUND TO BE CLEAR AND CONVINCING OR WHETHER IT WAS ARBITRARY OR CAPRICIOUS?

II. WHETHER THE BOARD DENIED DR. McFADDEN'S CONSTITUTIONAL RIGHTS OF DUE PROCESS OF LAW GUARANTEED TO HIM BY BOTH THE CONSTITUTION OF THE STATE OF MISSISSIPPI AND THE UNITED STATES CONSTITUTION?

*Appendix A*

## LEGAL ANALYSIS

¶ 20. Judicial review of an administrative decision is limited. This Court recognizes that

> [o]ur Constitution does not permit the judiciary of this State to retry de novo matters on appeal from administrative agencies. Our courts are not permitted to make administrative decisions and perform the functions of an administrative agency. Administrative agencies must perform the functions required of them by law. When an administrative agency has performed its function, and has made the determination and entered the order required of it, the parties may then appeal to the judicial tribunal designated to hear the appeal. The appeal is a limited one, however, since the courts cannot enter the field of the administrative agency. The court will entertain the appeal to determine whether or not the order of the administrative agency (1) was supported by substantial evidence, (2) was arbitrary or capricious, (3) was beyond the power of the administrative agency to make, or (4) violated some statutory or constitutional right of the complaining party. This rule has been thoroughly settled in this state.

Mississippi State Bd. of Nursing v. Wilson, 624 So.2d 485, 489 (Miss.1993) (quoting Mississippi State Tax Comm'n v. Mississippi-Alabama State Fair, 222 So.2d 664, 665 (Miss.1969)).

¶ 21. "The only grounds for overturning administrative agency action by the appellate process is that the state agency has acted capriciously, unreasonably, arbitrarily; has abused its discretion or has violated a vested constitutional right of a party. Wilson, 624 So.2d at 489 (quoting Melody Manor Convalescent Center v. Mississippi State Department of Health, 546 So.2d 972, 974 (Miss.1989)).

¶ 22. "Moreover, there is a rebuttable presumption in favor of the action of an administrative agency and the burden of proof is upon one challenging its action." Wilson, 624 So.2d at 489 (quoting County Board of Education of Alcorn County v. Parents and Custodians of Students at Rienzi School Attendance Center, 251 Miss. 195, 168 So.2d 814, 818 (1964)).

¶ 23. While this standard of review is highly deferential, it is by no means a "rubber stamp." See Wilson, 624 So.2d at 490.

Sufficiency of the Evidence

¶ 24. Because the licensure statutes and regulations at issue in this case are penal in nature, the Board is required to prove its case against Dr. McFadden by clear and convincing evidence, and the statutes and regulations at issue must be strictly construed in favor of Dr. McFadden. See Hogan v. Mississippi Bd. of Nursing, 457 So.2d 931, 934 (Miss.1984) "The judicial eye looks to see whether a fair-minded fact finder might have found the evidence clear and convincing that the offense had occurred and where that may be said, we will not disturb the Board's judgment."

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Riddle v. Mississippi State Bd. of Pharmacy, 592 So.2d 37, 41 (Miss.1991).

¶ 25. Dr. McFadden complains the Board's administrative decision was not supported by clear and convincing evidence. Dr. McFadden raises issues regarding the accuracy of Mr. Washington's affidavit, particularly the method used to calculate the dosages of controlled substances prescribed[3], the Board's findings of fact, and the relative credibility and weight to be accorded each party's witnesses, particularly the expert witnesses. Dr. McFadden's concerns about the accuracy of Mr. Washington's affidavit will be discussed below when we address Dr. McFadden's claim that he was denied his right to due process of law. The Court will now address Dr. McFadden's concerns about the Board's findings of fact and the relative credibility and weight to be accorded the parties' witnesses.

¶ 26. Issues of fact and credibility are the primary responsibility of the trier of fact. Accordingly, this Court should not reweigh the facts nor substitute its judgment for

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3. Specifically, Dr. McFadden complains the method employed by the Board was simply a counting of pills and such a method fails to recognize that many of the prescriptions can be dispensed in various strengths, i.e., 15 mg to 300 mg. Dr. McFadden claims he consistently prescribed the lower strengths. He also complains the investigator failed to count the days of the last prescriptions, thereby rendering the entire calculation wrong. Finally, Dr. McFadden claims the investigator failed to recognize that many of the prescriptions at issue could be taken at the same time.

that of the fact finder as to credibility issues. The reviewing court "is only concerned with the reasonableness of the administrative order, not its correctness." Mississippi Dep't of Envtl. Quality v. Weems, 653 So.2d 266, 281 (Miss.1995). The question is simply "whether substantial evidence supports the findings made by the agency." Id.

¶ 27. The Board contends more than sufficient evidence was presented to the Board to satisfy the "substantial credible evidence" standard by which decisions of administrative boards are reviewed in Mississippi. The Board outlines the following facts for this Court's consideration:

Dwight Kee

¶ 28. During the period of February 24, 1995, through Janauary 2, 1996, Dr. McFadden issued to Mr. Kee fifty-six separate (56) prescriptions for a total of 2,998 dosage units of controlled substances. On at least twenty one (21) separate occasions Dr. McFadden issued prescriptions for controlled substances to Mr. Kee at a time when the patient would not have been finished taking the same drug from a prior prescription issued by Dr. McFadden had the patient followed Dr. McFadden's own instructions as to daily rate of consumption for the drugs. Mr. Kee testified that he expressed concern to Dr. McFadden and other doctors about the drugs he was consuming and the fact that he may have a drug abuse problem. Dr. McFadden's medical records contain no reference to Mr. Kee's requests for premature refills (a probable indication that the patient is being oversupplied with medication) and no reference to Dr.

McFadden's conclusion that Mr. Kee was the "best candidate for suicide of any patient in my practice."

¶ 29. During the profile period, Dr. McFadden issued fifteen (15) prescriptions to Mr. Kee in which Dr. McFadden recorded into the patient's medical record only the type of drug and quantity described. In each of these fifteen (15) instances, Dr. McFadden failed to record the patient's vital signs, any observation of the patient's condition, or how the patient was progressing under his treatment plan. Dr. McFadden also issued Mr. Kee an additional eight (8) prescriptions for controlled substances with no corresponding entry whatsoever in the patient's medical record.[4] The Board argues Dr. McFadden's failure to record the issuance of a prescription and his failure to document the vital signs/observations regarding the patient into the patient's medical record violates Section IV.E and Section IV.F of the Board's rules and regulations "Pertaining to Prescribing, Administration, and Dispensing of Medication."

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4. Section IV.E of the rules and regulations requires that when a physician issues a prescription for controlled substances, he must not only enter the name, dose, strength and quantity of the controlled substance, but he must also show a complete record of the examination, evaluation, and treatment of the patient. Comment One of the Board's rules and regulations advises physicians that the "failure to record in patient file prescriptions for controlled substances issued or failure to record patient visits" is one of the criteria which the Board considers when determining whether a "good faith prior examination or medical indication" exists.

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Patricia Lovelace

¶ 30. Between January 3, 1995, and January 26, 1996, Dr. McFadden issued Ms. Lovelace sixteen (16) prescriptions for a total of 2,700 dosage units of controlled substances. A review of Ms. Lovelace's medical record indicates she was avoiding surgery which could have alleviated her pain, and instead, she requested additional quantities of specific types of controlled substances, which Dr. McFadden prescribed. The Board claims this type of activity constitutes a "red flag" suggesting possible drug abuse. As to nine (9) of the sixteen (16) prescriptions issued to this patient, Dr. McFadden recorded in the patient's record only the name of the drug and quantity issued. Dr. McFadden failed to record any reference to the patient's vital signs, any observation of the patient's condition, or any information as to the status of the patient's course of treatment. The Board argues such omissions are violations of Section IV.E and Section IV.F of the Board's rules and regulations "Pertaining to Prescribing, Administration, and Dispensing of Medication."

Jeffrey Gilmore

¶ 31. Between January 12, 1995, and January 12, 1996, Dr. McFadden issued to Mr. Gilmore eighteen (18) prescriptions for a total of approximately 2,250 dosage units of controlled substances. In denying this patient's claim for permanent disability for workers' compensation, the Administrative Law Judge specifically found that Mr. Gilmore was "doctor shopping" for a disability rating when he initially consulted Dr. McFadden in November, 1994.

The Administrative Law Judge also found that Dr. McFadden was known as a "physician who will render extended treatment based on a patient's subjective complaints of pain," and further found that Dr. McFadden's choice of treatment "was not required by the nature of [Gilmore's] injury. . . ." Of the eighteen prescriptions Dr. McFadden issued to Mr. Gilmore during the profile period, four (4) of them were issued with no corresponding entry in the patient's medical record. As to nine (9) of the other prescriptions, Dr. McFadden merely recorded the name of the drug and the quantity prescribed. The Board argues this is yet another violation of Section IV.E and Section IV.F of the Board's rules and regulations.

Jackie Tate

¶ 32. Between January 4, 1995, and January 16, 1996, Dr. McFadden issued thirty one (31) prescriptions for a total of 3,036 dosage units of controlled substances to Mr. Tate. Dr. McFadden described this patient as "one of the top 4 or 5 possible suicide candidates in my practice", yet he failed to refer this patient to a specialist for a psychiatric evaluation. Instead, Dr. McFadden continued to prescribe Mr. Tate an average of eight (8) dosage units of narcotics per day and, at times, up to thirteen (13) dosage units per day.

¶ 33. The Board claims Dr. McFadden also issued these prescriptions at a time when he knew or should have known of the patient's possible drug abuse. Nineteen (19) of the thirty one (31) prescriptions issued during the profile period were issued early, i.e., at a time when the patient would

still have had the medication if he were consuming it at the proper daily rate.

¶ 34. Eight (8) of the thirty one (31) prescriptions Dr. McFadden issued to Mr. Tate were issued with no corresponding entry in the patient's medical record. Dr. McFadden also issued this patient an additional ten (10) prescriptions in which he recorded only the drug and quantity prescribed, i.e., Dr. McFadden failed to record the patient's vital signs, any observation of the patient's condition, or any notation concerning the status of the patient's treatment plan. The Board concludes these practices are violations of Section IV.E and IV.F of the Board's rules and regulations "Pertaining to Prescribing, Administration and Dispensing of Medication."

¶ 35. The Board argues the above facts demonstrate that it reasonably concluded Dr. McFadden was in violation of the rules and regulations of the Board "Pertaining to Prescribing, Administration and Dispensing of Medication." The Board argues these facts also support the Board's conclusion that Dr. McFadden prescribed drugs having addiction-forming or addiction-sustaining liability otherwise than in the course of legitimate professional practice. The Board further concludes that this pattern of behavior, which Dr. McFadden continued to engage in after being warned by the Board, constituted unprofessional conduct, including dishonorable or unethical conduct likely to harm the public.

¶ 36. More specifically, the Board concludes the evidence presented at the hearing revealed that [illegible] at least

forty three (43) separate occasions Dr. McFadden prescribed controlled substances without maintaining a complete record of his examination, evaluation, and treatment of the patient, including a documentation of his diagnosis and reason for prescribing, dispensing, or administering the controlled substance in violation Section IV. E. The Board also concludes that on an additional twenty (20) occasions, Dr. McFadden made no entry whatsoever in the patient's medical record to reflect that he had issued the patient a prescription for controlled substances. The Board also points out that these omissions on the part of Dr. McFadden took place after the Board's 1992 warning letter reminding him of his duty to comply with the Board's rules and regulations. The Board asserts that on this basis alone, its decision to suspend Dr. McFadden's license to practice medicine in this State was supported by substantial credible evidence.

¶ 37. The Board also claims Dr. McFadden's forty (40) violations of Section IV.F justify its action in restricting his license to practice medicine. This Section of the Board's rules and regulations "Pertaining to Prescribing, Administration and Dispensing of Medication" provides that "[n]o physician shall prescribe, administer or dispense any controlled substance or other drug having addiction-forming or addiction-sustaining liability without a good faith prior examination and medical indication therefore." The Official Comment to this Section states that:

> proper medical practice require[s] that, upon any encounter with a patient, in order to establish proper diagnosis and regimen of treatment, a physician must take three steps: (a) take and

> record an appropriate medical history, (b) carry out an appropriate physical examination, and (c) record the results. The observance of these principles as a function of the 'course of legitimate professional practice' is particularly of importance in cases in which controlled substances are to play a part in the course of treatment."

Section IV.F, Official Comment. (emphasis added). The Official Comment further states that in determining whether a physician acted in "good faith" in issuing prescriptions for controlled substances, the Board will look to whether "the physician dispens[ed] drugs to patients having no medical need, when the physician knew or should have known that the patients were addicts" and "repeated refills over relatively short periods of time or the issuance of prescriptions at a time when the patient should not have been finished taking the same medication from a prior prescription had the prescription directions been properly followed or the correct dosage taken." Section IV.F., Official Comment. The Board asserts that in the cases of patients Mr. Kee and Mr. Tate, Dr. McFadden prematurely issued at least forty (40) prescriptions for controlled substances.

¶ 38. Furthermore, according to the Board, Dr. McFadden's one hundred and three (103) violations of Section IV.E and Section IV.F constitute "dishonorable or unethical conduct likely to deceive, defraud or harm the public." Section 73-25-29(8)(d) of the Mississippi Code states that "unprofessional conduct" such as "dishonorable

or unethical conduct likely to deceive, defraud or harm the public" constitutes grounds for the Board to suspend, revoke or restrict a physician's license to practice medicine in Mississippi. Miss.Code Ann. § 73-25-29(8)(d); See also Miss.Code Ann. § 73-25-83(a) (authorizing the Board to discipline a physician for dishonorable or unethical conduct likely to deceive, defraud or harm the public). In its November 22, 1996, Order, the Board concluded that Dr. McFadden's repeated violations of the rules pertaining to controlled substance record keeping/patient monitoring constituted "unprofessional conduct" within the meaning of Section 73-25-29(1).

¶ 39. The Board also notes that under Section 73-25-29(13) "[v]iolations of any provision(s) of the Medical Practice Act or the rules and regulations of the [B]oard or of any order, stipulation or agreement with the [B]oard" are action giving the Board authority to suspend, revoke or restrict a physician's license to practice medicine in Mississippi. Miss.Code Ann. § 73-25-29(13). The Board argues that its disciplinary sanctions against Dr. McFadden were clearly authorized by these statutes governing such actions.

¶ 40. The Board further asserts that the expert testimony offered at the hearing clearly established that Dr. McFadden's prescribing practices were outside the course of legitimate professional practice and amounted to unprofessional conduct. The Board's expert Dr. Patrick concluded that Dr. McFadden had issued prescriptions outside the course of legitimate professional practice to each of the four patients at issue. Dr. Patrick also concluded that

Dr. McFadden issued prescriptions for controlled substances without proper medical indication when he stated that "in virtually every case here, certainly three of the four cases, there was just insufficient [medical] evidence to put these patients even on short-term opioid [controlled substances], because the diagnosis is either controversial or nonexistent." Dr. Patrick further concluded that Dr. McFadden's prescribing practices amounted to unprofessional conduct likely to harm the public. Concerning Ms. Lovelace, Dr. Patrick concluded that "[i]t is inconceivable to me that a knowledgeable physician would place such a patient on six to seven Tylenol Number 3's per day for long-term ongoing management of a pain problem diagnosed as fibromyalgia." Regarding Mr. Gilmore, Dr. Patrick concluded that the volume of controlled substances Dr. McFadden prescribed "was totally inappropriate." Concerning the volume of controlled substances prescribed to Mr. Tate, Dr. Patrick stated he "could not find adequate basis [or] anything appropriate about that."

¶ 41. Finally, the Board alleges that Dr. McFadden's own admissions support the Board's decision to suspend his medical license. The Board notes that Dr. McFadden is a "self trained" pain medicine specialist. The record reveals Dr. McFadden had no residency or internship training in any speciality which involves the practice of pain management, i.e., anesthesiology, neurosurgery, neurology, orthopaedics, etc. Dr. McFadden is a pediatrician by formal medical training.

¶ 42. The Board also argues that during his testimony Dr. McFadden acknowledged having issued prescriptions

for controlled substances with directions to the patient that were contrary to the maximum daily dosages set forth in the Physicians' Desk Reference (i.e., he told Mr. Kee to take one to two Vicodin ES every four to six hours). The Board claims that Mr. Kee could have taken up to six Vicodin ES per day per Dr. McFadden's directions. The Board states that the maximum daily dosage recommended by the Physicians' Desk Reference for Vicodin ES is five per day, i.e., the specific warning being that "[t]he total 24 hour dose should not exceed five tablets."

¶ 43. The Board also directs this Court's attention to Dr. McFadden's admission that the advice contained in the Board's 1992 warning letter concerning his controlled substance prescribing/patient monitoring practices was good advice and Dr. McFadden's comment that he "knew all that . . . and was carrying out most of that." In addition, the Board calls attention to Dr. McFadden's acknowledgment that the Board's rules and regulations concerning patient records require physicians to make a record of the examination, evaluation, and treatment of the patient, including a diagnosis and reason for prescribing any controlled substances. When asked if he understood that "just entering a prescription only" in a patient's file was insufficient, Dr. McFadden responded that he "never understood it that way." Concerning the Board's record keeping/patient monitoring rules, Dr. McFadden further stated that "I had no knowledge that you people wanted something in the record. I'll have to change my whole practice."

¶ 44. The Board also notes that when confronted with the fact that he had issued twenty one (21) premature

prescriptions for controlled substances to Mr. Kee, Dr. McFadden claimed "the problem was the pharmacist here because there is no way that the pharmacist should have filled some of these prescriptions as early as he did. And I have no knowledge that Dwight [Kee] was taking so many of these pills as he was sometimes. So that was a mistake on my part." The Board notes Dr. McFadden's expert Dr. McKellar admitted that two or three premature refills to a patient would indicate there "is a problem," and that 21 premature refills "would be pretty high." Dr. McKellar also stated that premature refills would be "a red flag to you that there's a problem" and could indicate that the patient is hoarding the medication or disbursing it to others.

¶ 45. The Board argues these responses exemplify Dr. McFadden's failure to properly manage patients to whom he was prescribing large quantities of controlled substances having addiction forming qualitites. The Board also states that it is not surprising that Dr. McFadden had "no knowledge that Dwight [Kee] was taking so many of these pills," in light of the fact that he failed to properly record twenty three (23) of the fifty six (56) prescriptions he issued to Mr. Kee during the profile period. The Board also points out that when asked to account for these premature prescriptions, Dr. McFadden tried to place responsibility on the pharmacist who had simply filled the prescriptions according to Dr. McFadden's orders. The Board further notes that regarding Dr. McFadden's nineteen (19) premature prescriptions issued to Mr. Tate, Dr. McFadden acknowledged that the quantity of drugs prescribed was "excessive — if he took it all." In addition, the Board reminds this Court that Dr. McFadden admitted to having

issued prescriptions without the proper record keeping notations in the patient's medical files. Dr. McFadden explained that he failed to maintain his patient files properly because of a "misunderstanding" of the Board's rules and regulations.

¶ 46. The standard of review applicable in the instant case requires this Court to give great deference to the trier of fact concerning issues of fact as well as the credibility of witnesses. As previously stated, the reviewing court "is only concerned with the reasonableness of the administrative order, not its correctness." Weems, 653 So.2d at 281. Based on the substantial evidence discussed above, we conclude that the record supports the reasonableness of the Board's decision to suspend Dr. McFadden's medical license.

¶ 47. Dr. McFadden misconstrues several cases claiming they support his claim that the Board should not have taken this disciplinary action against him. Dr. McFadden cites Miller v. State Bd. of Pharmacy, 262 So.2d 188, 191 (Miss.1972), for the proposition that poor record keeping in the dispensing of controlled substances is, of itself, insufficient to support the revocation of a pharmacist's license. However, in Miller, the administrative board was reversed because "no statute, or rule or regulation of the Board . . . has been cited to us as having established any standards for the keeping of records by pharmacists." Miller, 262 So.2d at 190. The Miller case is distinguishable from the instant case. Dr. McFadden violated Sections IV.E and IV.F of the Board's rules and regulations "Pertaining to Prescribing, Administration, and Dispensing Medication" which clearly establish the standard for physicians in keeping medical records.

¶ 48. Dr. McFadden also relies upon Hogan v. Mississippi Bd. of Nursing, 457 So.2d 931, 935-36 (Miss.1984), in which this Court reversed an administrative board's finding that a nurse had misappropriated controlled substances. However, Hogan involved different statutes and different substantive allegations than those at issue here. Id. at 932-33. In Hogan, the question was whether a nurse misappropriated supplies of controlled substances held by her employer. Id. Here, the question is whether a physician failed to follow the rules requiring him to maintain specific records concerning treatment of his patients. We conclude that Hogan is not controlling here on this issue.

¶ 49. In addition, Dr. McFadden relies upon the foreign jurisdiction cases of McNiel v. Tennessee Bd. of Med. Exam'rs, No. 01-A-01-9608-CH-00383, 1997 WL 92071 (Tenn.Ct.App. March 5, 1997), Johnston v. Department of Prof. Reg., Bd. of Med. Exam'rs, 456 So.2d 939 (Fla.Dist.Ct.App.1984), and In re DiLeo, 661 So.2d 162 (La.Ct.App.1995). The McNiel case involved the question of whether the opinion of a single expert witness constituted substantial, credible evidence that the defendant physicians had overprescribed controlled substances. McNiel, 1997 WL 92071 at *1-3. The Johnston case and the DiLeo case both involved allegations that the defendant physician overprescribed controlled substances to certain patients. Johnston, 456 So.2d at 939-40. However, there was no allegation in any of these cases that the defendant physician failed to maintain proper records of the prescriptions at issue. Hence, we find that Dr. McFadden's reliance on these cases is misplaced.

*Appendix A*

Due Process

¶ 50. Dr. McFadden argues he was denied a fair and impartial hearing before a neutral tribunal in violation of his constitutional right to due process of law. More specifically, Dr. McFadden contends that he was denied due process of law because "the Board acted as investigator, prosecutor and judge." Dr. McFadden also asserts that "[t]he comments and actions of the Board show that it had abdicated its role as a neutral arbiter and was present simply to assist in proving Dr. McFadden's guilt of the charges made." According to Dr. McFadden, "the questions and commentary by the [Board] members were not to ascertain the true facts regarding Dr. McFadden's administration of controlled substances for patients in intractable pain, but to condemn him." Dr. McFadden claims "[t]he Board repeatedly manifested its bias toward Dr. McFadden and his witnesses throughout the hearing."

¶ 51. Both the United States and Mississippi Constitutions guarantee Dr. McFadden due process of law before an administrative agency. U.S. Const. Amend. XIV; Miss Const. Art. 3, § 4. Administrative proceedings "must be conducted in a fair and impartial manner, free from any suspicion of prejudice, unfairness, fraud or oppression." Mississippi State Bd. of Health v. Johnson, 197 Miss. 417, 19 So.2d 445, 447 (Miss.1944). "Due process always stands as a constitutionally grounded procedural safety net in administrative proceedings." McGowan v. Mississippi State Oil & Gas Bd., 604 So.2d 312, 318 (Miss.1992), cert. denied, 506 U.S. 1052, 113 S.Ct. 976, 122 L.Ed.2d 130 (1993).

¶ 52. Dr. McFadden suggests the combination of investigative and adjudicative functions of the Board resulted in unfairness to him. For example, he complains the medical consultant who assisted in the investigation sat with the Board and fully participated with the Board in making its findings of fact and its ultimate opinion. In support of this argument, Dr. McFadden cites McGowan, 604 So.2d at 316. However, due process is not offended simply because the Board performed both investigative and adjudicative functions. McGowan, 604 So.2d at 315-16; see also Winthrow v. Larkin, 421 U.S. 35, 56, 95 S.Ct. 1456, 43 L.Ed.2d 712 (1975) (noting "It is also very typical for the members of administrative agencies to receive the results of investigations, to approve the filing of charges or formal complaints instituting enforcement proceedings, and then to participate in the ensuing hearings. This mode of procedure does not violate the Administrative Procedures Act, and it does not violate due process of law.") (footnote omitted). Accordingly, Dr. McFadden's complaint "that the Board acted as investigator, prosecutor and judge" is without merit.

¶ 53. Dr. McFadden also alleges the Board was biased or prejudiced against him, a situation that would be impermissible under both the United States and Mississippi Constitutions. This Court has held "there is a presumption that the officers conducting the hearing and the members of the Board behave honestly and fairly in the conduct of the hearings and in the decision-making process." United Cement v. Safe Air for the Env't, Inc., 558 So.2d 840, 842 (Miss.1990) (citing Harrison County Bd. v. Morreale, 538 So.2d 1196, 1202 (Miss.1989)). "Absent some showing of

personal or financial interest on the part of the hearing officer or evidence of misconduct on the officer's part, this presumption is not overcome." United Cement, 558 So.2d at 842-43.

¶ 54. The Board reminds this Court that administrative hearings are unlike courtroom proceedings, in that the formalities of practice, procedure and evidence are relaxed. See Riddle, 592 So.2d at 43. The Board contends that "a contentious atmosphere can be expected in many administrative hearings, and an attitude bordering on partisanship and even hostility, as reflected in exchanges between the adjudicator and the charged party does not in and of itself prove bias." See 2 Am.Jur.2d, Administrative Law § 50 at 73(1994)(footnote omitted).

¶ 55. At Dr. McFadden's hearing, Board members questioned the witnesses, as is common practice in administrative hearings. While several comments made by Board members could be fairly characterized as hostile, we conclude these comments do not amount to unfair prejudice or bias against Dr. McFadden.

¶ 56. Dr. McFadden misconstrues several comments made by members of the Board and mistakenly reaches the conclusion the Board was biased against him. For example, Dr. McFadden claims that Board member Dr. Richard Riley questioned Dr. McFadden's medical expertise. Dr. Riley's comments, when read in context, reveal that Dr. Riley simply questioned Dr. McFadden's expertise in diskoprophy because Dr. McFadden had previously testified he had no formal training in this speciality, yet he claimed to be "one

of the world experts" in this field. Dr. McFadden also alleges that Dr. Riley wrongfully suggested that Dr. McFadden was "dangerous." Dr. Riley actually questioned whether a lack of formal training might be dangerous.

¶ 57. Dr. McFadden also argues that the Board insinuated that he was not an authority on diseases. However, in response to Dr. McFadden's comment that he is a "world expert" on diskoprophy and an expert on disc disease and spine disease, Dr. Riley's question "what makes you an authority on disc disease and facet disease and spine disease?" does not amount to prejudice or bias against Dr. McFadden.

¶ 58. Dr. McFadden also claims that on two occasions Dr. Riley stated that Dr. McFadden's testimony was "meaningless." Again, Dr. McFadden misconstrues Dr. Riley's statements. Dr. Riley's first comment, "this is meaningless", was in response to Dr. McFadden "speaking 90 miles an hour" about the validity of data he relied upon. The second comment involved a question posed to Dr. McFadden as to what made him an authority on disc disease, facet disease and spine disease. Dr. McFadden answered he had "done hundreds of hours of research on [his] own time, of [his] own choosing, and spent many thousands of dollars of [his] own money." To this answer, Dr. Riley responded "[m]eaningless."

¶ 59. Dr. McFadden also contends Dr. Riley stated that Dr. McFadden was "being cruel" to his patients and stated that Dr. McFadden's testimony "will never convince me." Dr. Riley's comment about Dr. McFadden "being cruel" to

his patients was in reference to patients whom Dr. McFadden had diagnosed as being suicidal, yet he failed to record this information in the patients' medical records or refer them to a psychiatric specialist. Dr. Riley noted that it would be "cruel" to these patients to "give them all the narcotics they want. They may be suicidal, and you give them narcotics, and narcotics cause personality changes." Furthermore, Dr. Riley's comment "you'll never convince me" was made in the context of an exchange between Dr. Riley and Dr. McFadden concerning the subject of alcoholism. Dr. Riley concluded the discussion by stating "I'll never convince you and you'll never convince me." Read in context, these comments do not demonstrate bias or impartiality; and therefore, this argument is without merit.

¶ 60. Dr. McFadden also contends that his witness Priscilla Lovelace, whom he characterizes as a "mentally slow charity patient," was "attacked with vengeance" by the Board. At the hearing, Dr. Freda Bush asked Ms. Lovelace several questions, including whether Ms. Lovelace was compensating Dr. McFadden for his services.[5] A review of the record reveals Dr. Bush was merely trying to clarify a confusing area of Ms. Lovelace's testimony.

¶ 61. Dr. McFadden also refers to the Board's more recent investigation of him, involving events subsequent to the disciplinary action at issue. Dr. McFadden claims this conduct constitutes "a pattern and practice of harassment

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5. The actual question by Dr. Bush was "[s]o you've been seeing him for a year, and you've paid him nothing? Okay. I'm not trying to embarrass you. It's just that you said that you pay him something."

and intimidation practiced by this Board to do harm to Dr. McFadden." Dr. McFadden's reference to this more recent investigation is not relevant to the issues presently before this Court. See Turner v. Nicolson, 151 Miss. 325, 117 So. 329, 331 (1928) (holding the appellate court could only consider the trial court record and any rights arising out of facts or matters occurring since trial below must be presented to the trial court); Terry v. Superintendent of Ed., 211 Miss. 462, 52 So.2d 13, 14 (1951) (stating appellate courts "review only such matters as were considered by the lower court").

¶ 62. Dr. McFadden also argues that the affidavit filed by Mr. Washington was "riddled with errors." First, Dr. McFadden complains Counts I, VI and IX asserted against him in the affidavit alleged violations of a non-existent statute. While the initial draft of the affidavit contained a typographical error in these three counts (i.e., it cited Section 73-25-13 rather than 73-25- 29 of the Code), this error was later corrected by the Board's counsel. Dr. McFadden also asserts that the patients' average daily consumption quantities calculated by investigators for controlled substance prescriptions issued by Dr. McFadden were "manifestly wrong." Specifically, Dr. McFadden alleges that in calculating the average daily consumption for each of the four patients at issue, the overall time period in which the drugs were consumed should be enlarged by the number of days allowed by the last prescription Dr. McFadden issued to each patient during the profile period. Mr. Washington testified that because the average daily consumption figures he calculated do not include the final prescription Dr. McFadden issued during the period of time

in question, the calculation does not take into account the time Dr. McFadden may have allotted for the patient to take the final prescription. The Board explains that the final prescription for each patient within the profile period was not included in the average daily consumption figures because the investigators had no way of knowing how quickly the patient would have consumed the last prescription, i.e., the investigators did not know if or when the patient would have sought his next refill because of the limited scope of the prescription profile.

¶ 63. Dr. McFadden also suggests that because there were no opening arguments in this case this somehow contributed to the alleged denial of his due process rights. First, it should be noted Dr. McFadden made no contemporaneous objection to the Board's decision to waive opening statements. Second, opening statements are often waived in cases where there is already a general understanding of the issues to be addressed. Therefore, we conclude this argument is without merit.

¶ 64. Finally, Dr. McFadden characterizes this case as "a disagreement among two groups of professionals about the appropriate course of treatment" for chronic non-malignant pain patients instead of a disciplinary action for improper patient monitoring and improper controlled substance prescribing practices. Dr. McFadden states that as a result of his "difference of opinion" as to the proper course of treatment for "chronic pain" patients, he "was severely punished."

¶ 65. Dr. McFadden's argument is supplemented by an amicus curiae brief which discusses governmental

regulation over physicians' treatment of "chronic non-malignant pain" patients. In its amicus curiae brief, the American Pain Society and the American Academy of Pain Medicine advocate public policy arguments relative to the physicians' use of controlled substances: (1) chronic pain is a serious medical condition, (2) long-term opioid treatment for chronic pain is medically accepted, and (3) the long-term sanctioning of a physician for prescribing opioid treatment for chronic pain absent a clear showing that the physician acted outside the course of professional practice will deter other physicians.

¶ 66. A Louisiana court recently rejected a "difference of professional opinion" argument similar to the one asserted by Dr. McFadden in this case. Holladay v. Louisiana State Bd. of Med. Examiners, 689 So.2d 718, 725-26 (La.Ct.App.1997) (sanctioning the defendant physician for failure to monitor patients and failure to examine patients before prescribing narcotics to them). The physician argued that "a conflict exists between two divergent schools of thought, one more liberal than the other, as to the appropriate manner of prescribing controlled substances in the treatment of chronic non-malignant pain," and that "because of this conflict and in absence of any governing written standards, the Board cannot find [the physician] in violation of [the applicable rules]." Id. at 726. The Louisiana court held that "[the physician's] argument misses the point. It is not [the physician's] liberal prescribing philosophy which resulted in the Board's decision, rather it was [the physician's] failure to adhere to basic precepts of medical practice or to follow the appropriate medical standards that were his violations.

Certain basic standards are recognized by both schools of thought." Id. Similarly, this Court concludes that Dr. McFadden misses the point. It was Dr. McFadden's failure to record the issuance of numerous controlled substance prescriptions, among other things, in violation of the Board's rules and regulations that resulted in this disciplinary proceeding.

## CONCLUSION

¶ 67. Mississippi law mandates that when a physician prescribes controlled substances, he or she must maintain accurate records of such prescriptions for each patient treated. Dr. McFadden failed to maintain such records not only in violation of Mississippi law but also in contravention of prudent medical practice.

¶ 68. The record substantially supports the Board's findings of fact, and consequently, the Board's decision to place restrictions on Dr. McFadden's ability to practice medicine in this State was not arbitrary or capricious. Also, a fair reading of the record reveals that Dr. McFadden was not denied his right to due process of law and that he received a fair and impartial hearing. Accordingly, the judgment of the Hinds County Chancery Court is

¶ 69. AFFIRMED.

PITTMAN, P.J., BANKS, McRAE, JAMES L. ROBERTS, Jr., SMITH and WALLER, JJ., CONCUR.

PRATHER, C.J., and MILLS, J., NOT PARTICIPATING.

## APPENDIX B — JUDGMENT OF THE CHANCERY COURT OF THE FIRST JUDICIAL DISTRICT OF HINDS COUNTY, MISSISSIPPI DATED AND FILED OCTOBER 14, 1997

IN THE CHANCERY COURT OF THE
FIRST JUDICIAL DISTRICT OF
HINDS COUNTY, MISSISSIPPI

CASE NO. G96-2601 O/3

JOHN WILBUR McFADDEN, JR., M.D.

APPELLANT

v.

MISSISSIPPI STATE BOARD OF
MEDICAL LICENSURE

APPELLEE

JUDGMENT

THIS MATTER having come before this Court on appeal by John Wilbur McFadden, Jr., M.D., from a written Determination and Order rendered by the Mississippi State Board of Medical Licensure ("the Board"), on November 22, 1996, suspending Dr. McFadden's medical license, subject to a conditional stay, and having considered all testimony and arguments of counsel, this Court rendered its Opinion on October 8, 1997, as filed herein. In conformity with said Opinion and in compliance with Miss. R. Civ. P. 58 and Miss. Unif. Chan. Ct. R. 5, this Court now enters its Judgment implementing said Opinion.

*Appendix B*

NOW THEREFORE, the written Determination and Order rendered November 22, 1996, by the Board against John Wilbur McFadden, Jr., M.D., Appellant, is hereby as a matter of law, AFFIRMED.

SO ORDERED, this the 14th day of October, 1997.

s/ Denise S. Owens
DENISE S. OWENS
CHANCELLOR

AGREED AS TO FORM:

s/ Stan T. Ingram
STAN T. INGRAM
HEIDELBERG & WOODLIFF, P.A.
ATTORNEY FOR APPELLEE

s/ Alex Alston
ALEX ALSTON
ALSTON, RUTHERFORD & VAN SLYKE
ATTORNEY FOR APPELLANT

## APPENDIX C — OPINION OF THE CHANCERY COURT OF THE FIRST JUDICIAL DISTRICT OF HINDS COUNTY, MISSISSIPPI DATED AND FILED OCTOBER 8, 1997

IN THE CHANCERY COURT OF THE
FIRST JUDICIAL DISTRICT OF
HINDS COUNTY, MISSISSIPPI

G-96-2601 O/3

JOHN WILBUR McFADDEN, JR., M.D.

APPELLANT

v.

MISSISSIPPI STATE BOARD OF
MEDICAL LICENSURE

APPELLEE

### OPINION

John Wilbur McFadden, Jr., M.D., appeals the written determination and order of appellee, Mississippi State Board of Medical Licensure ("the Board"), dated November 22, 1996, suspending his medical license, subject to a conditional stay. Subject-matter jurisdiction of this appeal is properly in this court. Mississippi Code Annotated §73-25-27 (1972); Mississippi Code Annotated §73-25-95 (1972).

*Appendix C*

The appeal is submitted, without oral argument, for consideration upon the administrative record filed April 15, 1997,[1] appellant's unfiled supporting brief, the Board's opposing brief filed June 4, 1997, and appellant's unfiled reply brief. Appellant contends the Board's order violates his due-process right, is unsupported by credible substantial evidence, and is arbitrary and capricious. For the reasons stated herein, this court affirms the Board's order.

**The Board's order**

Pursuant to summons dated June 12, 1996, the Board noticed appellant of eleven charges against him concerning his prescribing activity from January 1, 1995, through January 31, 1996, for four patients, as follows:

> (1) As to patients Dwight Kee, Jeffrey Gilmore, and Jackie Tate, one count each for violating Mississippi Code Annotated §73-25-29(13) (1972)[2] and the Board's Rules and Regulations

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1. See separate order entered October 6, 1997, regarding appellee's motion, filed June 19, 1997, for clarification and/or correction of the record.

2. Section 73-25-29(13) provides

> The grounds for the nonissuance, suspension, revocation or restriction of a license or the denial of reinstatement or renewal of a license are: . . . (13) Violation of any provision(s) of the Medical Practice Act or the rules and regulations of the board or of any order, stipulation or agreement with the board.

(Cont'd)

*Appendix C*

"Pertaining to Prescribing, Administration and Dispensing of Medication" ("Rules"), section IV.E.,[3] for failure to maintain a complete record of the examination, evaluation, and treatment of the patient, including documentation of the diagnosis and reason for prescribing controlled substances,

(2) As to Mr. Kee, patient Priscilla Lovelace, Mr. Gilmore, and Mr. Tate, one count each for

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(Cont'd)
As reflected in the Board's order, section 73-25-29(13) was redesignated section 73-25-29(1)(m) from July 1, 1996 through June 30, 1997. 1996 Laws, ch. 507, §57; 1997 Laws, ch. 564, §1.

3. Rule IV.E. provides

> A physician who prescribes, dispenses or administers a controlled substance shall maintain a complete record of his examination, evaluation and treatment of the patient which must include documentation of the diagnosis and reason for prescribing, dispensing or administering any controlled substance; the name, dose, strength, quantity of the controlled substance and the date that the controlled substance was prescribed, dispensed or administered. The record required by this subsection shall be maintained in the patient's medical records, provided that such medical records are maintained at the office of the physician and are available for inspection by the representative of the Mississippi State Board of Medical Licensure pursuant to authority granted in Miss. Code Ann. §41-29-125 (Supp. 1986).

violating section 73-25-29(13) and Rules Section IV.F.,[4] as a result of prescribing controlled substances or other drugs having addiction-forming or addiction-sustaining liability without a good faith examination or medical indication thereof, and

(3) As to Mr. Kee, Ms. Lovelace, Mr. Gilmore, and Mr. Tate, one count each for violating

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4. Rule IV.F. provides: "No physician shall prescribe, administer or dispense any controlled substance or other drug having addiction-forming or addiction-sustaining liability without a good faith prior examination and medical indication therefore."

The footnoted comment to Rule IV.F. provides, in pertinent part:

> A determination as to whether a "good faith prior examination and medical indication therefore" exists depends upon the facts and circumstances in each case. . . . Standards of proper medical practice require that, upon any encounter with a patient, in order to establish proper diagnosis and regimen of treatment, a physician must take three steps: (a) take and record an appropriate medical history, (b) carry out an appropriate physical examination, and (c) record the results. The observance of these principles as a function of the "course of legitimate professional practice" is particularly of importance in cases in which controlled substances are to play a part in the course of treatment. . . . A determination of proper "medical indication" also requires a careful examination of the nature of the drug and all circumstances surrounding dispensation.

sections 73-25-29(3)[5] and (8)(d),[6] and Mississippi Code Annotated §73-25-83(a) (1972)[7] for prescribing drugs having addiction-

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5. Section 73-25-39(3) provides: "The grounds for the nonissuance, suspension, revocation or restriction of a license or the denial of reinstatement or renewal of a license are: . . . (3) Administering, dispensing or prescribing any narcotic drug, or any other drug having addiction-forming or addiction-sustaining liability otherwise than in the course of legitimate professional practice." As reflected in the Board's order, section 73-25-29(3) was redesignated section 73-25-29(1)(c) from July 1, 1996 through June 30, 1997. 1996 Acts, ch. 507, §57; 1997 Acts, ch. 564, §1:

6. Section 73-25-29(8)(d) provides "The grounds for the nonissuance, suspension, revocation or restriction of a license or the denial of reinstatement or renewal of a license are: . . . (8) Unprofessional conduct, which includes, but is not limited to: . . . (d) Being guilty of any dishonorable or unethical conduct likely to deceive, defraud or harm the public." As reflected in the Board's order, section 73-25-29 (8)(d) was redesignated section 73-25-29(1)(h)(iv) from July 1, 1996, through June 30, 1997. 1996 Acts, ch. 507, §57; 1997 Acts, ch. 564, §1.

7. Section 73-25-83(a) provides:

> The board shall have authority to deny an application for licensure or other authorization to practice medicine in this state and to discipline a physician licensed or otherwise lawfully practicing within this state who, after a hearing, has been adjudged by the board as unqualified due to one or more of the following reasons: (a) Unprofessional conduct as defined in the physician licensure and disciplinary laws, pursuant to Section 73-25-29.

> forming or addiction-sustaining liability otherwise than in the course of legitimate professional practice, and for unprofessional conduct, including dishonorable or unethical conduct likely to deceive, defraud or harm the public,

being grounds for probation, suspension or revocation of appellant's Mississippi medical license. After an evidentiary hearing, the Board unanimously found appellant guilty on each count. For these violations, the Board suspended appellant's medical license indefinitely, subject to an automatic stay conditioned on numerous probationary terms that severely restrict, or, in some circumstances, prohibit his privileges to prescribe controlled substances. The Board's order provides appellant with the right to petition for release of any or all of the probationary conditions after expiration of five years from the order's effective date, November 22, 1996.

**Standard of review**

The standard governing judicial review of administrative-agency decisions is established and is the same for trial and appellate courts, as follows:

> This Court does not review administrative agency decisions *de novo*; rather, it looks to see if the decision was supported by substantial evidence, or if it was arbitrary and capricious, beyond the power of the agency, or in violation of some constitutional or statutory right of the

> complaining party. There is a rebuttable presumption in favor of the agency decision and the burden of proof is on the party challenging that decision.

*Montalvo v. Mississippi State Board of Medical Licensure*, 671 So.2d 53, 55-56 (1996) (citation omitted); *Mississippi State Board of Public Accountancy Acting as Board and Trial Board v. Gray*, 674 So.2d 1251 (Miss. 1996) (stating trial courts are held to the same standard when reviewing agency decisions). The reviewing court gives "great deference to the decisions of administrative agencies, believing that they know best how to police their own, especially when the board sitting in judgment is comprised of fellow practitioners." *Mississippi Board of Nursing v. Hanson*, No. 95-CC-00542-SCT, 1997 WL575986, at *4 (Miss. Sept. 18, 1997).

**Due process**

Appellant argues he was denied a fair and impartial hearing before a neutral tribunal in violation of his constitutional right to due process of law. More specifically, appellant argues (1) the Board impermissibly acted as his investigator, prosecutor and judge, (2) the Board members were biased against him and the practice of pain management through administration of opioids[8] or other

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8. The *Compact Oxford English Dictionary* (2d ed. 1991) defines "opioid" to mean "opiate." *Black's Law Dictionary* (6th ed. 1990) at 1092, defines "opiate" to mean "any substance having an addiction-forming or addiction-sustaining liability similar to morphine or being capable of conversion into a drug having addiction-forming or addiction-sustaining liability."

analgesic medications, as evidenced by their hostile cross-examination of him and his witnesses, and (3) the comments and opinions voiced by the Board members at the evidentiary hearing constituted impermissible unsworn testimony not subject to cross-examination. The Board responds appellant should not be permitted to raise his due-process argument for the first time on appeal, or, in the alternative, that the due-process argument is without merit. In reply, appellant does not dispute his failure to contemporaneously object to the Board's conduct at the hearing, but asserts "[n]o law, rule or regulation requires objections to hostile comments and questions or statement of opinion offered by the Board," appellant's reply brief at 11, or, in the alternative, that the Board's conduct constitutes plain error, making no objection necessary.

As a general rule, an appellant cannot raise matters at the appeal level that were not objected to during the administrative hearing. *Mississippi Board of Nursing v. Belk*, 481 So.2d 826, 829 (Miss. 1985) (quoting *Unemployment Compensation Commission of Territory of Alaska v. Aragan*, 329 U.S. 143 (1946): "A reviewing court usurps the agency's function when it sets aside the administrative determination upon a ground not therefore presented and deprives the commission of an opportunity to consider the matter, make its ruling, and state the reasons for its action."). Nonetheless, in Mississippi, the Mississippi Supreme Court has held it retains inherent discretionary authority to disregard that rule and notice plain errors affecting substantial rights or in order to prevent a manifest miscarriage of justice. *Marion City Board of Supervisors v. Pennington*, 673 So.2d 748 (Miss. 1996). This court

presumes it may exercise the same discretion in its review of the Board's decision. *Cf.* Mississippi Rule of Evidence 103(d) ("Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the court.").

Plain-error analysis is conducted without hard and fast rules on a case-by-case basis upon consideration of such factors as the obviousness of the error, the strength of the case against the defendant, and whether a timely objection would have cured the error or enabled the trier-of-fact to prevent injustice. 5 AM. JUR. 2D *Appellate Review* §773-74 (CD-ROM LawDesk, June 1997). In the federal context, plain error has been described as a "rare species" in civil cases. 21 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE §5043 (1997 Supp.).

In the present case, appellant's plain-error analysis consists of a citation to *United States v. Woods*, 252 F.2d 334 (2d Cir. 1958), and the conclusory statement that the Board's conduct constituted plain error. In *Woods*, which was an appeal from a conviction for selling narcotics in violation of a federal statute, the reviewing court cited Federal Rule of Criminal Procedure 52(b),[9] and, despite the defendant's failure to object at trial, reviewed the error that occurred when the trial judge told the jury he personally believed the defendant was guilty. Based on its distinctively different facts, this court does not find *Woods* is not

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9. Rule 52(b) provides: "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."

persuasive authority for appellant's plain-error argument. Moreover, based upon this court's review of the entire record, it is not persuaded appellant has demonstrated plain error occurred.

In considering whether the Board's combination of investigative, prosecutorial and adjudicatory functions constitutes plain error, this court observes it has been held such combinations in other agencies does not necessarily constitute a due-process violation. *E.g., Withrow v. Larkin*, 421 U.S. 35, 58 (1975) ("[T]he combination of investigative and adjudicative functions does not, without more, constitute a due process violation[.]"); *McGowan v. Mississippi State Oil & Gas Board*, 604 So.2d 312 (Miss. 1992), *cert. denied* 506 U.S. 1052 (1993) (vacating and remanding on other grounds). On the facts of the present case, and in the absence of clear authority to the contrary, this court is not persuaded the Board's combination of investigative, prosecutorial, and adjudicatory functions constitutes plain error.

In considering whether the Board members' allegedly biased questions to appellant and his witnesses at the hearing constitutes plain error, this court is mindful:

> [T]here is a presumption that the officers conducting the hearing and the members of the Board behave honestly and fairly in the conduct of the hearings and in the decision-making process. Absent some showing of personal or financial interest on the part of the hearing officer or evidence of misconduct on the officer's part, this presumption is not overcome.

*Hanson*, No. 95-CC-00542-SCT, 1997 WL575986, at *7 (Miss. Sept. 18, 1997) (quoting *United Cement Company v. Safe Air for the Environment, Inc.*, 558 So.2d 840, 842-43 (Miss. 1990) (citation omitted)). Appellant does not dispute the fact that a board member may question witnesses "to bring out important matters, clear up apparent confusion or provide full explanation of the testimony." Appellant's reply brief at 6. *Cf.* Mississippi Rule of Evidence 614(b) (authorizing the court to interrogate witnesses). Nonetheless, with numerous citations to the hearing transcript, appellant contends "this Board was out to crucify [him], regardless of the evidence." Appellant's brief at 28. Upon its review of the entire record, however, this court is not persuaded by appellant's characterization of the Board's conduct, and, in the absence of any other suggested foundation for financial or personal interest in or prejudgment of this case by the Board members, concludes appellant has not rebutted the aforementioned presumption of fairness, or demonstrated plain error by reason of the Board members' questions at the hearing.

Appellant devotes primary discussion to *Jones v. State Department of Public Health and Welfare*, 354 S.W.2d 37 (Mo. Ct. App. 1962), in support of its contention, with numerous citations to the hearing transcript, that the Board members' statements constituted impermissible unsworn testimony. In *Jones*, the Missouri appellate court affirmed a trial-court order setting aside the agency's decision. In *Jones*, the Missouri appellate court concluded the appellant had been denied a fair administrative hearing because the hearing record, which was certified to the agency director to make the agency decision, contained (over the claimant's

contemporaneous objection) unauthorized opinions on the merits of the controversy and evidence amounting to unsworn testimony from the appointed attorney-referee who had conducted and prosecuted the administrative hearing. The Missouri appellate court stated:

> Whether or not the director was influenced in his decision by the referee's views of the case, we are unable to say — any more than we could say, with informed certainty, whether like indiscretions on the part of a trial judge in a jury case had any effect on the jury's verdict. *It is sufficient to note that the prejudicial remarks and expressed views of the referee could have been a factor in the turn of the decision against claimant.*

*Id.* at 41. [Emphasis added.] This court does not find *Jones* persuasive authority for appellant's plain-error argument. In *Jones*, plain error was not an issue. Moreover, even assuming, arguendo, the Board members' statements during the hearing "could have been a factor in the turn of [their] decision against [appellant]," *id.*, this court must proceed to weigh that assumption, for purposes of plain-error analysis, against such factors as the obviousness of the error, the strength of the case against appellant, and whether timely objection would have cured the error or enabled the Board to prevent injustice. In the absence of clear authority to the contrary, this court is not persuaded plain error occurred by reason of the Board members' comments at the hearing, or that such comments rose to the level of unsworn testimony subject to appellant's right of cross-examination.

*Cf. Reynolds v. Louisiana State Board of Medical Examiners*, 646 So.2d 1244 (La. Ct. App. 1994) (holding due process did not require the appellee's members to submit to cross-examination by the physician they were investigating).

**Sufficiency of evidence**

In considering whether the agency's findings are supported by substantial evidence, the reviewing court "looks to see whether a fair-minded fact finder might have found the evidence clear and convincing that the offense had occurred[.]" *Riddle v. Mississippi State Board of Pharmacy*, 592 So.2d 37, 41 (Miss. 1991). This standard does not entitle the reviewing court to reweigh the facts or to substitute its judgment for that of the agency. *Hanson*, No. 95-CC-00542-SCT, 1997 WL575986 (Miss. Sept. 18, 1997).

The charges against appellant were set forth in a two-page summons, exhibiting the twenty-five page affidavit of the Board's investigator, Thomas Washington, summarizing the results of his investigation into appellant's prescribing activities. At the evidentiary hearing on the charges, which was conducted on November 21 and 22, 1996, the Board called two witnesses: Mr. Washington and Dr. Bernard Patrick, a board-certified neurological surgeon who was admitted, without objection, as "an expert." Record, Volume I at 96. Appellant then testified in his own behalf and called six witnesses: Dr. David McKeller, who was admitted without objection as an expert in pain medicine, Dr. George McGee, Dr. Daniel Brookhoff, who

was admitted without objection as an expert in pain management, Ms. Lovelace, Mr. Tate, and Mr. Kee. The parties introduced a total of twenty exhibits, and were represented by counsel throughout the proceedings. The evidence was undisputed that the four subject patients suffer from intractable, noncancer pain.

Mr. Washington, the Board's first witness, testified as to his investigative findings set forth in his aforementioned affidavit, which was introduced into evidence. Mr. Washington testified his findings were based on his review, assisted by Dr. Tom Stevens, the Board's medical consultant and Dr. Patrick, of appellant's medical files for the four subject patients, and interviews with pharmacists to verify appellant's authorization of prescriptions. Mr. Washington testified he had been employed by the Board for six years. Mr. Washington's investigative findings included, but were not limited to, the following:

> *Mr. Kee.* During the period between February 25, 1995, and January 2, 1996, appellant issued Mr. Kee fifty-six controlled-substance prescriptions totaling approximately 2,998 dose units including refills (9.64 average daily dose), and administered six controlled-substance injections. On twenty-one occasions, prescriptions were issued at a time when Mr. Kee should not have been finished taking the same or similar medication from a prior prescription had the prescription directions been followed or the correct dosage taken; on fifteen occasions, appellant failed to enter into the file a complete

record of an examination or evaluation including documentation of a diagnosis or medical justification for prescribing controlled drugs or evidence of a good faith examination or medical indication thereof; on eight occasions, appellant issued a prescription for a controlled substance with no corresponding entry in Mr. Kee's medical file. The medical file included three entries containing indicators or "red flags" suggesting possible drug abuse by Mr. Kee, and, based thereon, appellant knew or should have known Mr. Kee was having a problem with controlled substances. Mr. Kee was started on a regimen of controlled substances without a prior determination that non-addictive substances were ineffective. The controlled substances prescribed are drugs having addiction-forming and addiction-sustaining liability.

*Ms. Lovelace.* During the period between January 3, 1995, and January 29, 1996, appellant issued Ms. Lovelace sixteen controlled-substance prescriptions totaling approximately 2,700 dose units including refills (6.91 average daily dose). On nine occasions, appellant failed to fully document and enter a complete record of an examination or evaluation including documentation of a diagnosis or medical justification for prescribing controlled drugs or evidence of a good faith examination or medical indication thereof. The medical file included four entries containing indicators or "red flags"

suggesting possible drug abuse by Ms. Lovelace, and, based thereon, appellant knew or should have known Ms. Lovelace was having a problem with controlled substances. Ms. Lovelace was started on a regimen of controlled substances without a prior determination that non-addictive substances were ineffective. The controlled substances prescribed are drugs having addiction-forming and addiction-sustaining liability.

*Mr. Gilmore.* During the period between January 12, 1995, and January 12, 1996, appellant issued Mr. Gilmore eighteen controlled-substance prescriptions totaling approximately 2,250 dose units including refills (6.16 average daily dose). On nine occasions, appellant failed to enter into the file a complete record of an examination or evaluation including documentation of a diagnosis or medical justification for prescribing controlled drugs or evidence of a good faith examination or medical indication thereof; on four occasions, appellant issued a prescription for a controlled substance with no corresponding entry in Mr. Gilmore's medical file. The medical file included two entries containing indicators or "red flags" suggesting possible drug abuse by Mr. Gilmore, and, based thereon, appellant knew or should have known Mr. Gilmore was having a problem with controlled substances. Mr. Gilmore was started on a regimen of controlled substances

without a prior determination that non-addictive substances were ineffective. The controlled substances prescribed are drugs having addiction-forming and addiction-sustaining liability.

*Mr. Tate.* During the period between January 4, 1995, and January 16, 1996, appellant issued Mr. Tate thirty-one controlled-substance prescriptions totaling approximately 3,036 dose units including refills (8.05 average daily dose). On nineteen occasions, prescriptions were issued at a time when Mr. Tate should not have been finished taking the same or similar medication from a prior prescription had the prescription directions been followed or the correct dosage taken; on ten occasions, appellant failed to enter into the file a complete record of an examination or evaluation including documentation of a diagnosis or medical justification for prescribing controlled drugs or evidence of a good faith examination or medical indication thereof; on eight occasions, appellant issued a prescription for a controlled substance with no corresponding entry in Mr. Tate's medical file. The medical file contained four entries containing indicators or "red flags" suggesting possible drug abuse by Mr. Tate and, based thereon, appellant knew or should have known Mr. Tate was having a problem with controlled substances. The controlled substances prescribed are drugs having addiction-forming and addiction-sustaining liability.

*Appendix C*

Mr. Washington's affidavit identifies the prescriptions by date, prescription number, drug, and quantity (including refills).

Dr. Bernard Patrick, the Board's second witness, testified he had reviewed and analyzed appellant's four subject medical files, which were introduced into evidence. On direct examination, Dr. Patrick opined, without objection, that, based upon his experience and training and his review of the four subject medical files: (1) appellant had prescribed controlled substances or other drugs having addiction-forming or addiction-sustaining liability outside the course of professional practice, (2) appellant had prescribed drugs having addiction-forming or addiction-sustaining liability to the four subject patients without proper medical indication, and (3) appellant prescribing other controlled substances to the four subject patients would constitute unprofessional conduct likely to harm the public, including the patient.

This court summarizes appellant's multiple arguments for reversal on this point as raising issues regarding the accuracy of Mr. Washington's affidavit, particularly the mathematical computations of per diem average dose unit prescribed, the relative credibility and weight to be accorded each party's witnesses, particularly the expert witnesses, and conflicting testimonies. Such issues of fact and credibility are the primary responsibility of the trier-of-fact. On appeal, this court neither reweighs the facts nor substitutes its judgment for that of the fact-finder as to credibility issues. Said another way, this court's substantial-evidence review" is concerned only with the

reasonableness of the administrative order, not its correctness." *Mississippi Department of Environmental Quality v. Weems*, 653 So.2d 266, 281 (Miss. 1995) (quoting 2 AM.JUR. *2D ADMINISTRATIVE LAW* §541). With regard for our settled scope of review, this court concludes the record before it contains evidence that a fair-minded fact finder might have found clear and convincing proof the charged offenses had occurred.

**Arbitrary or capricious action**

In considering whether an agency acted arbitrarily and capriciously, "[t]he reviewing court is charged to study the record and the legislative facts to which the challenged order points and divine a rational basis upon which the administrator may have acted." *McGowan*, 604 So.2d at 322. This standard requires "administrators say at least minimally why they do what they do so someone can see whether it be arbitrary or capricious." *Id.* In the present case, this standard is met. The Board's thirty-page order contains detailed findings of fact, incorporating, but not limited to, lengthy portions of Mr. Washington's investigative findings, and conclusions of law as to the eleven offenses.

**Conclusion**

For the reasons stated above, this court affirms the Board's order. The Board's counsel is directed to prepare a final Judgment in conformity with this opinion and in accordance with Mississippi Rule of Civil Procedure 58 and Uniform Chancery Court Rule 5.

*Appendix C*

IT IS SO ORDERED AND ADJUDGED, this the 8th day of October, 1997.

s/ Denise S. Owens
DENISE S. OWENS, CHANCELLOR

## APPENDIX D — DETERMINATION AND ORDER OF THE MISSISSIPPI STATE BOARD OF MEDICAL LICENSURE DATED NOVEMBER 22, 1996

## BEFORE THE MISSISSIPPI STATE BOARD OF MEDICAL LICENSURE

## IN THE MATTER OF THE PHYSICIAN'S LICENSE

## OF

## JOHN WILBUR McFADDEN, JR., M.D.

## DETERMINATION AND ORDER

THIS MATTER came on regularly for hearing on November 21, 1996, before the Mississippi State Board of Medical Licensure, pursuant to Miss. Code Ann. Section 73-25-27 (1972) as amended. The Board initiated these proceedings on June 12, 1996, by issuance of a Summons against John Wilbur McFadden, Jr., M.D. (hereinafter "Licensee"), charging Licensee with violation of Section 73-25-83(a) and Subsections (3), (8)(d) and (13) of Miss. Code Ann. Section 73-25-29 (1972), codified effective July 1, 1996, as Subsections (1)(c), (1)(h)(iv) and (1)(m) of Section 73-25-29. The specific allegations were set forth by Affidavit of Thomas E. Washington, Investigator, dated June 12, 1996, attached to and made a part of the Summons, wherein Licensee was charged with eleven (11) separate counts of violation of the Mississippi Medical Practice Act, including administering, dispensing or prescribing narcotic drugs or other drugs having addiction-forming or addiction-sustaining liability otherwise than in the course of legitimate professional practice; unprofessional conduct

which includes being guilty of dishonorable or unethical conduct likely to harm the public; and violation of the rules and regulations of the Board pertaining to "Prescribing, Administering, and Dispensing of Medication."

This matter was originally set for hearing on July 18, 1996. Pursuant to petitions duly presented, Licenses was granted a continuance until today's date.

The hearing was convened at 11:00 a.m., Licensee appearing in person, represented by Hon. Alex A. Alston, Jr., Jackson, Mississippi. Complaint Counsel for the Board was Hon. Stan T. Ingram. Sitting as legal advisor for the Board was Hon. Van Gillespie, Special Assistant Attorney General. Evidence and testimony were then presented. Based upon the above, the Board renders the following Findings of Fact, Conclusions of Law, and Order:

## FINDINGS OF FACT

1.

John Wilbur McFadden, Jr., M.D., hereinafter referred to as "Licensee", is a physician licensed to practice medicine in the State of Mississippi, currently holding License No. 05129.

2.

On or about April 9, 1992, investigators of the Mississippi State Board of Medical Licensure visited Licensee's clinic in Tupelo, Mississippi, to perform a review

of selected patient charts, identified through prescription profile efforts as receiving unusual quantities of controlled substance prescriptions from Licensee. Seven (7) patient medical files were reviewed and discussed with Licensee and all were identified as having some type of problem with drug use/abuse. Many of the prescriptions issued to said patients were not properly documented in the charts. Investigators also discussed the results of an accountability, audit and compliance inspection, as a follow-up to a prior audit and inspection performed by the Board and the U.S. Drug Enforcement Administration in 1988. As a result of this visit, Frank J. Morgan, Jr., M.D., then Executive Officer of the Board, corresponded with Licensee, confirming the visit by the investigators and providing certain recommendations relative to the prescribing of controlled substances. The specific recommendations of Dr. Morgan were as follows:

> "Also discussed with you were prescription profiles and dispensing records indicating several of your patients have been receiving large quantities of controlled substances over a long period of time. You are strongly encouraged to document a diagnosis which is supported by history and physical findings and by the results of any appropriate tests. Before beginning a regimen of controlled drugs, you may want to make a determination through trial or through a documented history that non-addictive modalities are not appropriate. Appropriate specialists, such as neurologists, orthopedists, or psychiatrists, should be consulted for specific

tests or evaluations, if indicated. The results of these referrals and evaluations or tests should be included in the patient's chart.

You should make certain that you are in control of the supply of drugs to your patients and that you are not dealing with a "drug seeking" patient. You are expected to maintain regular monitoring of the patient. Under certain conditions "drug holidays" are appropriate. This allows you to evaluate the original symptoms.

The objective of this Board is to improve the quality of medical care and to insure that all licensees practice medicine with reasonable skill and safety to patients. This Board does not have a magic formula for determining the doses and duration of the administration for any drug. The Board does expect physicians to create a record that shows the proper indication for the use of a drug or other therapy, monitoring of the patient where necessary, the patient's response to therapy on follow-up visits and all rationale for continuing or modifying the therapy.

You should be aware that post-dating controlled substance prescriptions is prohibited by federal law. Any prescription you issue should be dated and signed on the date of issuance.

Neither this Board nor the Federal Drug Enforcement Administration will tolerate

excessive prescribing or dispensing in the absence of legitimate medical need or the maintenance of addiction in patients. Should any violation in any area of state or federal law be identified in the future, possible disciplinary action will be considered. I cannot emphasize to you the importance of being in compliance with every regulation regarding the practice of medicine and in the dispensation and handling of controlled substances."

Following additional prescription profile efforts during January and February, 1996, 36 patient charts were obtained from Licensee's clinic for analysis by investigators of the Mississippi State Board of Medical Licensure. Of the medical files seized, four (4) were chosen for the purpose of this hearing, i.e., the medical files of Dwight Kee, Pricilla Lovelace, Jeffrey Gilmore and Jackie Tate.

3.

Contact with the United States Drug Enforcement Administration in New Orleans, Louisiana, in March, 1996, indicated that Licensee is currently registered to administer, dispense and prescribe controlled substances in Schedules II, IIN, III, IIIN, IV, and V pursuant to Uniform Controlled Substance Registration Certificate No. AM9471210.

4.

Between February 25, 1995, and January 2, 1996, Licensee did issue to Patient Dwight Kee, fifty-six (56)

prescriptions for controlled substances totalling approximately 2,998 dose units (9.64 per day) including refills. Among these prescriptions were eleven (11) prescriptions for 264 MS Contin 15mg; one (1) prescription for 30 MS Contin; eight (8) prescriptions for 139 Percocet; thirteen (13) prescriptions for 880 Vicodin; four (4) prescriptions for 220 Hydrocodone 5mg; eleven (11) prescriptions for 830 Vicodin ES; two (2) prescriptions for 280 Hydrocodone 7.5mg; one (1) prescription for 100 Tylenol #3; one (1) prescription for 15 Tylox; one (1) prescription for 30 Tranxene 7.5mg; one (1) prescription for 60 Ambien 5mg; and two (2) prescriptions for 150 Ambien 10mg. Said prescriptions are summarized as follows:

| Date | Script # | Drug | Qty |
|---|---|---|---|
| 01/02/96 | 436321 | Hydrocodone 7.5mg | 60x2 |
| 12/29/95 | 652161 | Vicodin ES | 10 |
| 11/27/95 | 434907 | Vicodin ES | 60x2 |
| 11/20/95 | 761291 | Vicodin | 60 |
| 10/27/95 | 433843 | Vicodin ES | 50x2 |
| 10/20/95 | Pt File | Vicodin | 50 |
| 10/16/95 | 647340 | MS Contin 15mg | 15 |
| 10/16/95 | 647341 | Vicodin ES | 30 |
| 10/09/95 | 433147 | Tranxene 7.5mg | 30 |
| 10/09/95 | 433146 | Vicodin ES | 50x1 |
| 10/03/95 | 432892 | Vicodin ES | 10 |
| 10/03/95 | 432893 | MS Contin 15mg | 30 |
| 10/02/95 | Pt File | MS Contin | 30 |
| 09/25/95 | 432579 | Vicodin ES | 40 |
| 09/22/95 | 432521 | MS Contin 15mg | 30 |

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| | | | |
|---|---|---|---|
| 09/14/95 | 432218 | Vicodin | 40 |
| 09/07/95 | 432039 | Ambien 10mg | 30x2 |
| 09/07/95 | 432038 | Vicodin ES | 40 |
| 09/07/95 | 431968 | MS Contin 15mg | 30 |
| 08/29/95 | 644448 | MS Contin 15mg | 30 |
| 08/23/95 | 431471 | MS Contin 15mg | 20 |
| 08/18/95 | 431348 | Vicodin | 60x1 |
| 08/14/95 | 148502 | Vicodin ES | 50 |
| 08/14/95 | 431146 | MS Contin 15mg | 25 |
| 08/06/95 | 430895 | MS Contin 15mg | 30 |
| 08/01/95 | 430753 | Vicodin ES | 60x1 |
| 07/25/95 | 147274 | Hydrocodone 5mg | 60 |
| 07/22/95 | 430438 | MS Contin 15mg | 24 |
| 07/17/95 | 430234 | MS Contin 15mg | 14 |
| 07/10/95 | 430055 | MS Contin 15mg | 16 |
| 07/07/95 | 146155 | Vicodin ES | 50x1 |
| 07/07/95 | 146154 | Percocet | 30 |
| 06/30/95 | 145758 | Percocet | 10 |
| 06/30/95 | 145759 | Vicodin | 50 |
| 06/30/95 | 145760 | Ambien 10mg | 20x2 |
| 06/26/95 | 429623 | Vicodin | 20 |
| 06/22/95 | 510969 | Percocet | 15 |
| 06/19/95 | 429430 | Vicodin | 60x1 |
| 06/12/95 | Pt File | Vicodin | 60 |
| 05/30/95 | 429194 | Vicodin | 60 |
| 05/29/95 | 428784 | Percocet | 12 |
| 05/25/95 | 428719 | Percocet | 12 |
| 05/25/95 | 428718 | Ambien 5mg | 30x1 |
| 05/25/95 | 428717 | Vicodin | 60x2 |
| 05/15/95 | 428295 | Vicodin | 60 |
| 05/12/95 | 428251 | Percocet | 30 |
| 05/08/95 | 428089 | Vicodin | 60 |

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| | | | |
|---|---|---|---|
| 04/29/95 | 497683 | Percocet | 15 |
| 04/25/95 | 427598 | Vicodin | 60 |
| 04/24/95 | 496549 | Percocet | 15 |
| 04/18/95 | 427305 | Tylox | 15 |
| 04/15/95 | 427226 | Hydrocodone 5mg | 50 |
| 04/07/95 | 426994 | Hydrocodone 5mg | 50 |
| 03/30/95 | 426644 | Hydrocodone 5mg | 50 |
| 03/13/95 | 426075 | Vicodin | 50 |
| 02/24/95 | 4409338 | Tylenol #3 | 50x1 |
| 02/24/95 | 4409349 | Vicodin | 30x1 |

During this profile period, Licensee did also administer to Patient Kee the following injections of controlled substances:

| Date | Script # | Drug | Qty |
|---|---|---|---|
| 10/17/95 | Adm Log | Demerol 50mg | 2cc |
| 08/18/95 | Adm Log | Demerol 50mg | 1cc |
| 07/10/95 | Adm Log | Demerol 50mg | 2cc |
| 07/07/95 | Adm Log | Demerol 50mg | 2cc |
| 06/22/95 | Adm Log | Demerol 50mg | 2cc |
| 04/14/95 | Adm Log | Demerol 50mg | 2cc |

The drugs MS Contin, MS Contin 15mg, Vicodin, Vicodin ES, Hydrocodone 7.5mg, Hydrocodone 5mg, Percocet, Demerol 50mg, Tylox, Tylenol #3, Tranxene 7.5mg, Ambien 5mg, and Ambien 10mg are controlled substances and drugs having addiction-forming and addiction-sustaining liability.

Patient Kee is a 30 year old male who initially saw Licensee on February 24, 1995. On the initial visit, the

patient presented Licensee with a complaint of "Approx T-3-T4 pain. Wears hyperextension brace. MVA 1993. PT, MRI, Myelogram Athens, GA. Wants trigger point injection. Has "flare-ups" q 4-5 months." Other complaints noted on visits with Licensee are: "Continued severe pain"; "NP- Severe today T/S- Severe today"; "NP- Constant T/S- Constant"; Severe neck and mild thoracic pain c lateral chest spasm right arm pain returned 1 wk"; "F/U Neck pain and H/A's "same" Had RF done in July".

Despite surgeries and treatment with large quantities of controlled substances by Licensee, Patient Kee continued to have complaints of neck, thoracic spine, shoulder and right upper extremity pain. As a part of the patient's treatment, Licensee requested and obtained a number of specialty examinations, including MRI of the thoracic spine (negative), limited radionuclide bone scan (normal), and MRI of the cervical spine (negative), along with numerous referrals to consultants/specialists, who performed diagnostic and therapeutic procedures, i.e., Bruce S. Senter, M.D., Jackson, Mississippi, John Peloza, M.D., Plano, Texas, Charles April, M.D. New Orleans, Louisiana, Michael Hammer, M.D., Birmingham, Alabama, Perry Savage, M.D., Birmingham, Alabama, and Donald C. Guild, M.D., Jackson, Mississippi. A number of said consults transpired after notice of the investigation and disciplinary proceedings. Many of the specialty examinations failed to support the continuous complaints of pain by Patient Kee.

Based upon the following, Licensee knew or should have known that Patient Kee was suffering from possible drug opioid therapy:

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a. On 21 separate occasions, as hereinafter provided, Licensee issued to Patient Kee a prescription for a controlled substance at a time when said patient should not have been finished taking the same medication or similar medications from a prior prescription had the prescription directions been properly followed or the correct dosage taken. The repeated prescriptions allowed Patient Kee to receive dose escalations far in excess of therapeutic levels, i.e., between April 29, 1995, and July 7, 1995, Patient Kee was prescribed an average of 21.12 controlled substances per day.

b. On several occasions, Licensee would attempt to limit the patient's use of the controlled substance, i.e., November 27, 1995, prescription for 60 Vicodin ES with two (2) refills, patient directed to take 1 tablet every 4-6 hours prn for pain, "must last 12 days." Although such entries would appear to suggest that Licensee was attempting to control the patient's consumption of addictive drugs, rarely did Licensee enforce his own recommendations.

c. During his testimony, Patient Kee openly acknowledged that he discussed with Licensee his drug problem and concern as to the amount of drugs which he was taking. A review of the file reflects no evidence where Licensee documented the discussion or the patient's concern.

d. The repeated prescriptions and multiple dose escalations clearly suggests drug hoarding by the patient.

*Appendix D*

Patient Kee is described by Licensee to be the "best candidate for suicide of any patient in my practice." Notwithstanding, Licensee did not make any entry in the file concerning the patient's suicidal ideation and did not refer the patient to Dr. Don Guild until well after the patient had already received substantial quantities of controlled substances and possibly after initiation of the Board's investigation.

Licensee issued to Patient Kee the following prescriptions at a time when said patient should not have been finished taking the same or similar medication from a prior prescription had the prescription directions been followed or the correct dosage taken:

| Date | Script# | Drug | Qty | Directions |
|---|---|---|---|---|
| 10/20/95 | Pt File | Vicodin | 50 | |
| 10/16/95 | 647341 | Vicodin ES | 30 | 1q4-6h Prn |
| 10/09/95 | 433146 | Vicodin ES | 50 x1 | 1q4-6h Prn |
| 10/03/95 | 432893 | MS Contin 15mg | 30 | 1po q8h Prn |
| 10/03/95 | 432892 | Vicodin ES | 10 | 1po q8h Prn |
| 10/02/95 | Pt File | MS Contin | 30 | 1po bid |
| 09/25/95 | 432579 | Vicodin ES | 40 | 1ud |
| 09/14/95 | 432218 | Vicodin | 40 | 1q4-6h |
| 09/07/95 | 431968 | MS Contin 15mg | 30 | 1bid |
| 09/07/95 | 432038 | Vicodin ES | 40 | 1q6h Prn |
| 08/29/95 | 644448 | MS Contin 15mg | 30 | 1po bid |
| 08/18/95 | 431348 | Vicodin ES | 60 | 1q4h prn |

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| | | | | |
|---|---|---|---|---|
| 08/14/95 | 431146 | MS Contin 15mg | 25 | 1po q12h Prn |
| 08/01/95 | 430753 | Vicodin ES | 60x1 | 1q4-6h Prn |
| 07/22/95 | 430438 | MS Contin 15mg | 24 | 1-a.m. & 2-p.m. |
| 06/30/95 | 145760 | Ambien 10mg | 20 x2 | 1 Hs |
| 06/26/95 | 429623 | Vicodin | 20 | 1q4h Prn Pa |
| 06/19/95 | 429430 | Vicodin | 60 x1 | 1po q4h Prn |
| 06/12/95 | Pt File | Vicodin | 60 | |
| 05/30/95 | 429194 | Vicodin | 60 | 1q4h Prn |
| 05/15/95 | 428295 | Vicodin | 60 | 1q4h Prn Pa |

Although medical file entries were found for the following prescriptions and injections, Licenses failed to enter into the file, a complete record of an examination or evaluation, including documentation of a diagnosis or medical justification for prescribing controlled drugs or evidence of a good faith examination or medical indication thereof:

| Date | Script# | Drug | Qty |
|---|---|---|---|
| 11/27/95 | 434907 | Vicodin ES | 60x2 |
| 11/20/95 | Pt File | Vicodin | 60 |
| 10/20/95 | Pt File | Vicodin | 50 |
| 09/25/95 | 432579 | Vicodin | 40 |
| 08/18/95 | Pt File | Vicodin ES | 60x1 |
| 08/18/95 | Pt File | Demerol 50mg | Im |
| 06/30/95 | 145760 | Ambien 10mg | 20x2 |
| 06/30/95 | 145759 | Vicodin | 50 |
| 06/30/95 | 145758 | Percocet | 10 |

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| | | | |
|---|---|---|---|
| 06/26/95 | 429623 | Vicodin | 20 |
| 06/22/95 | Pt File | Demerol 100mg | Im |
| 06/22/95 | 510969 | Percocet | 15 |
| 06/19/95 | 429430 | Vicodin | 60x1 |
| 06/12/95 | Pt File | Vicodin | 60 |
| 05/15/95 | 428295 | Vicodin | 60 |

In each instance, Licensee entered into the patient file reference to only the prescription, drug and amount. In each instance, the file contains no reference to vital signs, observation of the patient's condition, the status of the patient's treatment plan, whether the patient's request for medication is early, and if so, why the patient has failed to comply with Licensee's instructions. Further, Licensee issued to Patient Kee the following prescriptions for controlled substances with *no* corresponding entry whatsoever, in patient's medical file:

| Date | Script | Drug | Qty |
|---|---|---|---|
| 01/02/96 | 436321 | Hydrocodone 7.5mg | 60x2 |
| 08/23/95 | 431471 | MS Contin 15mg | 20 |
| 08/06/95 | 430895 | MS Contin 15mg | 30 |
| 07/25/95 | 147274 | Hydrocodone 5mg | 60 |
| 07/22/95 | 430438 | MS Contin 15mg | 24 |
| 07/17/95 | 430234 | MS Contin 15mg | 14 |
| 05/30/95 | 429194 | Vicodin | 60 |
| 04/15/95 | 427226 | Hydrocodone 5mg | 50 |

5.

Between January 3, 1995, and January 29, 1996, Licensee did issue to Patient Pricilla Lovelace, sixteen (16)

prescriptions totalling approximately 2,700 dosage units (6.91 per day) including refills. Among these prescriptions were fifteen (15) prescriptions for 2,500 Tylenol #3 and one (1) prescription for 200 Acetaminophen with Codeine #3. Said prescriptions are summarized as follows:

| Date | Script# | Drug | Qty |
|---|---|---|---|
| 01/29/96 | 139155 | Tylenol #3 | 100 |
| 01/11/96 | 138531 | Tylenol #3 | 100 |
| 11/27/95 | Pt File | Tylenol #3 | 100x2 |
| 11/13/95 | 136527 | Tylenol #3 | 100 |
| 10/27/95 | 136057 | Tylenol #3 | 100 |
| 09/29/95 | Pt File | Tylenol #3 | 100x1 |
| 09/06/95 | 134376 | Tylenol #3 | 100x1 |
| 08/01/95 | 4015021 | Tylenol #3 | 100x1 |
| 07/18/95 | 132943 | Tylenol #3 | 100 |
| 06/20/95 | 4014731 | Tylenol #3 | 100x1 |
| 05/01/95 | 130781 | Tylenol #3 | 100x1 |
| 04/05/95 | 4014325 | Tylenol #3 | 100x1 |
| 03/22/95 | 129413 | Tylenol #3 | 100x1 |
| 02/22/95 | Pt File | Tylenol #3 | 100x1 |
| 02/06/95 | 127785 | Tylenol #3 | 100 |
| 01/03/95 | 126682 | Acetam/Codeine#3 | 100x1 |

The drug Tylenol #3 and Acetaminophen with Codeine #3 are controlled substances and drugs having addiction-forming or addiction-sustaining liability.

Analysis of the medical file indicates that Patient Lovelace is a 33 year old female, who initially saw Licensee on May 3, 1994. On the initial visit, the patient presented

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Licensee with a complaint of, "in the morning she wakes up with LBP et thoracic pain. This has been going on for about 2 months, has trouble turning over in bed." Other complaints noted in the file are; "c/o Thoracic-intermediate pain LBP-intermediate pain with pain extending into l hip et leg"; "LBP with R &L buttocks pain Unable to work"; "Thoracic area is worse LBP is also worse c/o pain being @ its worse @ R-L hips. Needs Rx on T #3, Naprosyn, Elavil"; "C/O Thoracic area is the same c/o LBP is worse. Needs Rx on T #3, Naprosyn"; "LBP- R=L side L leg pain occ. Thoracic R= L side Sleeps 3-4 hrs with meds."; C/O LBP is constant, with Rt side pain Thoracic is only occ pain."; T/S Continues LBP Continues."; and "LBP worse Having more back thigh pain x 3 days."

The patient's file reflects a medical and personal history. Licensee's primary diagnosis was fibromyalgia/disc pain problems, yet the file contains no specialty evaluation or consult report, providing the underlying cause for the numerous complaints of low back pain. Notwithstanding, Licensee continued to aggressively prescribe Tylenol #3, so that during the one (1) year profile period the patient received an average of 6-7 Tylenol #3 per day.

The file maintained by Licensee contains indicators or "red flags" suggesting possible drug abuse by Patient Lovelace. Based on the following entries, Licensee knew or should have known of a possible problem with controlled substances:

(a) Entry dated July 12, 1994 indicates that Patient Lovelace was issued a prescription for Tylenol

#3 after complaining of "LBP with R & L buttocks pain Unable to work Seen ER X1 *Not interested in surgery now.*"

(b) Entry dated December 1, 1994, indicates that Patient Lovelace was issued a prescription for Tylenol #3 after complaining, "Thoracic area is worse LBP is also worse C/O pain being @ its worse @ R-L hips. *Needs Rx on T#3, Naprosyn, Elavil Not wanting surgery yet!*"

(c) Entry dated February 22, 1995, noted "T/S-unchanged LBP c R=L hip numbness *needs Rx on T #3.*"

(d) Entry dated August 1, 1995, noted, "LBP-R+l side. L leg pain-occ. *Needs Rx for T3.* Sleeps 2 hrs."

Although entries for the following prescriptions were found in patient's file, Licensee failed to fully document and enter a complete record of an examination or evaluation including documentation of a diagnosis or medical justification for prescribing the controlled substances or evidence of a good faith examination or medical indication thereof:

| Date | Script# | Drug | Qty |
|---|---|---|---|
| 01/29/96 | 139155 | Tylenol #3 | 100 |
| 01/11/96 | 138531 | Tylenol #3 | 100 |
| 11/13/95 | 136527 | Tylenol #3 | 100 |

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|---|---|---|---|
| 10/27/95 | 136057 | Tylenol #3 | 100 |
| 09/06/95 | 134376 | Tylenol #3 | 100x1 |
| 07/18/95 | 132943 | Tylenol #3 | 100 |
| 03/22/95 | 129413 | Tylenol #3 | 100x1 |
| 02/06/95 | 127785 | Tylenol #3 | 100 |
| 01/03/95 | 126682 | Acetam/Codeine#3 | 100x1 |

In each instance, Licensee entered into the patient file reference to only the prescription, drug and amount. In each instance, the file contains no reference to vital signs, observation of the patient's condition, the status of the patient's treatment plan, whether the patient's request for medication is early, and if so, why the patient has failed to comply with Licensee's instructions.

6.

Between January 12, 1995, and January 12, 1996, Licensee did issue to Patient Jeffrey Gilmore, eighteen (18) prescriptions for controlled substances totalling approximately 2,250 dose units, including refills. Among these prescriptions were eleven (11) prescriptions for 1,400 Tylenol #3; five (5) prescriptions for 600 Apap/Codeine 30mg; one (1) prescription for 120 Darvocet N100; and one (1) prescription for 80 Vicodin ES. Said prescriptions are summarized as follows:

| Date | Script# | Drug | Qty |
|---|---|---|---|
| 01/12/96 | Pt File | Tylenol #3 | 100x1 |
| 12/13/95 | 4439343 | Tylenol #3 | 100x1 |
| 11/13/95 | 4438803 | Tylenol #3 | 100x1 |

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|---|---|---|---|
| 10/27/95 | 4438520 | Apap/Codeine 30mg | 100 |
| 10/12/95 | 4438259 | Tylenol #3 | 100 |
| 09/12/95 | 4437755 | Apap/Codeine 30mg | 100x1 |
| 08/24/95 | 4437493 | Vicodin ES | 40x1 |
| 08/21/95 | 4437430 | Tylenol #3 | 100 |
| 08/04/95 | 4437179 | Apap/Codeine 30mg | 100 |
| 07/03/95 | Pt File | Tylenol #3 | 50 |
| 06/19/95 | Pt File | Tylenol #3 | 100x1 |
| 05/22/95 | 4436100 | Apap/Codeine 30mg | 100 |
| 04/19/95 | 4435599 | Darvocet N100 | 60x1 |
| 03/16/95 | 4435026 | Tylenol #3 | 100x1 |
| 03/03/95 | Pt File | Tylenol #3 | 50 |
| 02/10/95 | 4434424 | Tylenol #3 | 50x1 |
| 01/27/95 | 4434180 | Apap/Codeine 30mg | 50x1 |
| 01/12/95 | 4433915 | Tylenol #3 | 50 |

Tylenol #3, Apap/Codeine 30mg, Vicodin ES, and Darvocet N100 are controlled substances and drugs having addiction-forming and addiction-sustaining liability.

Patient Gilmore is a 28 year old male, who initially saw Licensee on November 4, 1992. On this visit, the patient presented Licensee with a complaint of "Neck et L shoulder pain Began *6-1-92*. Mid et lower back pain. Rt leg goes numb, ends of *all fingers* on Rt hand goes numb. Has H/A now only this type since 6-1-92."

Other complaints noted in the file are; "C/O Cervical pain-"a little better" still having muscle spasm"; "C/O Cervical pain Ha's since 11/26/92 Caudal relief lasted 1 week then Ha's started LBP et mid back pain on et off pain"; "C/O LBP- Burning pain med not help- Shooting "sharp

pain" radiating op to cervical pain- Rt. side most painful-caudal help 2 days"; "C/O LBP et burning between shoulders going up into neck. Neck brace doesn't help"; "Terrible shoulder pain"; "C/O Cervical pain extending into et between shoulders. C H/A LBP et Rt hip et pt leg"; "C/O Thoracic pain today (maybe, because LBP) LBP-extending into Rt hip et leg"; "C/O lower back pain neck tension & migraine"; and "Pain troublesome in low back L hip."

Patient Gilmore was a workers' compensation disability case. Prior to and during treatment, Licensee referred the patient to a number of specialists, or had access to other physicians who examined Gilmore in relation to his workers' compensation claim. Several of the specialists who examined and/or treated Gilmore recommended intensive rehabilitation and conservative therapy. A number of said evaluations did not support the patient's claim for disability and/or did not support the patient's continuing complaints of chronic pain. On January 27, 1995, during the early stages of the prescription profile effort by the Board investigators, Linda H. Thompson, Administrative Judge for the Workers' Compensation Commission, found that Gilmore had not established a permanent occupational disability because of a work injury. Judge Thompson specifically found that the "caudal epidural steroid injections" as administered by Dr. McFadden were not only unnecessary, but were harmful. In her order, the Administrative Judge noted:

> 4. Gilmore has not proved that he has sustained a permanent occupational disability because of the work injury. His testimony in that regard is simply not believable. He did not like

Dr. Eckman because Dr. Eckman wanted to help him return to work. He did not follow up on the pest control position at Terminix. His past work history is riddled with stories of "misunderstandings" and "communication problems." He has been in trouble with the law on several occasions. The weight of the evidence indicates that when he consulted Dr. McFadden in November 1994 he was "doctor shopping" for a disability rating. Dr. McFadden is known as a physician who will render extended treatment based on a patient's subjective complaints of pain.

5. The treatment rendered by Dr. John W. McFadden was not required by the nature of the claimant's injury or the process of his recovery therefrom, and the employer and carrier are not liable for his charges. Had Gilmore followed the advice of the specialists who treated him, Dr. Eckman and Dr. Lynch, to pursue an aggressive physical conditioning program in August 1992, the employer and carrier would have been liable for the charges therefor.

After the above workers' compensation order, Licensee did recommend that patient undergo a number of pain management procedures by Michael Hammer, M.D., of Birmingham, Alabama.

For the following prescriptions, Licensee failed to fully document and enter a complete record of an examination

or evaluation including documentation of a diagnosis or medical justification for prescribing controlled drugs or evidence of a good faith examination or medical indication thereof:

| Date | Script# | Drug | Qty |
|---|---|---|---|
| 01/12/96 | Pt File | Tylenol #3 | 100x1 |
| 12/13/95 | 4439343 | Tylenol #3 | 100x1 |
| 10/27/95 | 4438520 | Apap/Codeine 30mg | 100 |
| 10/12/95 | 4438259 | Tylenol #3 | 100 |
| 08/21/95 | 4437430 | Tylenol #3 | 100 |
| 07/03/95 | Pt File | Tylenol #3 | 50 |
| 04/19/95 | 4435599 | Darvocet N100 | 60x1 |
| 01/27/95 | 4434180 | Apap/Codeine 30mg | 50x1 |
| 01/12/95 | 1133915 | Tylenol #3 | 50 |

In each instance, Licensee entered into the patient file reference to only the prescription, drug and amount. In each instance, the file contains no reference to vital signs, observation of the patient's condition, the status of the patient's treatment plan, whether the patient's request for medication is early, and if so, why the patient has failed to comply with Licensee's instructions. Licensee issued to Patient Gilmore the following prescriptions for controlled substances with *no* corresponding entry whatsoever in medical file:

| Date | Script# | Drug | Qty |
|---|---|---|---|
| 09/12/95 | 4437755 | Apap/Codeine 30mg | 100x1 |
| 08/04/95 | 4437179 | Apap/Codeine 30mg | 100 |

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|---|---|---|---|
| 05/22/95 | 4436100 | Apap/Codeine 30mg | 100 |
| 03/16/95 | 4435026 | Tylenol #3 | 100 |

7.

Between January 4, 1995, through January 16, 1996, Licensee did issue to Patient Jackie Tate, thirty-one (31) prescriptions for controlled substances totalling approximately 3,036 dosage units (8.05 average daily dose) including refills. Among these prescriptions were eighteen (18) prescriptions for 2,220 Vicodin; eleven (11) prescriptions for 780 Hydrocodone 5mg; one (1) prescription for 6 Percocet; and one (1) prescription for 30 Propoxyphene Nap/100. A summary of said prescriptions is as follows:

| Date | Script# | Drug | Qty |
|---|---|---|---|
| 01/16/96 | 159124 | Vicodin | 60x3 |
| 01/15/96 | 567275 | Percocet | 6 |
| 01/08/96 | 565039 | Vicodin | 60 |
| 11/08/95 | 154350 | Propoxy Nap/100 | 30 |
| 11/01/95 | 547372 | Vicodin | 60x3 |
| 10/24/95 | 542542 | Hydrocodone 5mg | 60 |
| 10/11/95 | 539095 | Hydrocodone 5mg | 60 |
| 09/27/95 | 4406804 | Vicodin | 60x2 |
| 09/13/95 | 532701 | Hydrocodone 5mg | 60 |
| 09/04/95 | 528862 | Hydrocodone 5mg | 60 |
| 08/28/95 | Pt File | Vicodin | 60x2 |
| 08/21/95 | 4406644 | Vicodin | 60 |
| 08/16/95 | 148640 | Vicodin | 60 |
| 08/08/95 | 521936 | Hydrocodone 5mg | 60x1 |

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|---|---|---|---|
| 07/31/95 | 4406534 | Vicodin | 60x1 |
| 07/25/95 | 147276 | Hydrocodone 5mg | 60 |
| 07/18/95 | 516829 | Hydrocodone 5mg | 60 |
| 07/11/95 | 146391 | Vicodin | 60 |
| 06/27/95 | 512080 | Vicodin | 60 |
| 05/29/95 | 509954 | Hydrocodone 5mg | 60 |
| 05/27/95 | 4406277 | Hydrocodone 5mg | 60x1 |
| 05/05/95 | 499233 | Vicodin | 60x2 |
| 03/30/95 | 139677 | Vicodin | 60x2 |
| 03/15/95 | 485894 | Vicodin | 60x1 |
| 03/03/95 | 4405854 | Vicodin | 60x1 |
| 02/19/95 | 478528 | Hydrocodone 5mg | 60 |
| 02/03/95 | Pt File | Vicodin | 60x1 |
| 01/30/95 | 4405708 | Vicodin | 60x1 |
| 01/25/95 | 471208 | Hydrocodone 5mg | 60 |
| 01/11/95 | 466794 | Vicodin | 60 |
| 01/04/95 | 4405555 | Vicodin | 60 |

Patient Tate is a 26 year old male, who initially saw Licensee on March 2, 1989. On the initial visit, the patient presented Licensee with a complaint of "MVA 2-24-89 was in car and struck from the rear by another car. Pain started the next day 1. ER Union Co-exam, Rx c/o neck tightness c hyperextension R arm pain & numbness shoulder to *thumb* c/o LBP into R hip R leg "gets to feeling like giving out" pain wakes him at night."

Other complaints noted in the file are; "neck pain some improved pain came back c brace off LBP", R leg pain 3-4 x/wk Can't tell meds are helping"; "c/o lower R side et R leg is point of pain"; R leg pain post-to toes some numbness uses walking cane"; "Having numbness in arms

& aching. MVA in '89. Chronic LBP"; "C/O Burning up arm from hand Rt hand wants to stay numb LBP extends into Rt hip et leg some Rt side pain"; "C/O Pain in Rt hand, wrist et fore arm post op."; "Picking up fabric off pallets into shelves feet pain low back. 2/8/94- To ER per amb. X-rays, injection, Rx. Sleeping 3-4 c med. LBP-R-L hip pain extends both legs"; "C/O LBP-is constant c pain extends bilateral to legs Rt being worse, but tens does seem to help relieve pain. Can walk"; C/O LBP R=L side is unchanged. Employer ask him to see you because he has catch in R hip while working"; "C/O migraine", "Ha's x daily LBP-unchanged"; and "LBP to R side same Severe HA- R behind eye."

Despite surgeries and treatment with large quantities of controlled substances by Licensee, Patient Tate continued to have complaints of headaches, low back pain, and right leg pain. During treatment, Licensee referred Patient Tate to a number of different consultants and specialists, i.e., William A. Sims, M.D., Decatur, Alabama, Robert A. McGuire, M.D., Jackson, Mississippi, Luther Stumme, M.D., Tupelo, Mississippi, Michael Hammer, M.D., Birmingham, Alabama, and Robert A. Duke, M.D., Memphis, Tennessee. Many of the consultations followed an injury which Patient Tate suffered on February 8, 1994, while attempting to pick up a bag of concrete. During his testimony, Patient Tate acknowledged that he probably would not have attempted to pick up the bag of concrete had he not already been taking the pain medication prescribed by Licensee.

Patient Tate is described by Licensee as "one of the top four or five possible suicide candidates in my practice."

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Notwithstanding, Licensee did not at any time refer Patient Tate to a specialist for a psychiatric evaluation and consult and continued to prescribe to the patient an average of 8 Vicodin per day, and at times prescribed up to 13 Vicodin per day.

Based upon the following, Licensee knew or should have known of possible drug abuse:

1. As hereinafter noted, on 19 separate occasions, the patient obtained a prescription from Licensee at a time when said patient should not have been finished taking the same medication from a prior prescription had Licensee's directions been properly followed or the correct dosage taken.

2. The file contains a number of entries indicating that the patient continued to specifically request Vicodin, i.e., suggesting that Vicodin was the patient's drug of choice:

    a. Entry dated August 19, 1994 indicates that patient was issued a prescription for 60 Vicodin with one (1) refill after complaining of "LBP gets worse daily C/O numbness in R=L legs when sitting Needs Rx on Vistaril, Vicodin."

    b. Entry dated January 30, 1995, noted, "Ha's-still having daily but not so intense since taking Blocadren LBP-*unchanged* Needs Vicodin."

3. The file contains other entries indicating Licensee's awareness of the patient's attempts to obtain drugs early.

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a. Patient was issued a prescription for 60 Vicodin on October 24, 1995. A note in patient file written on an orange **Post It Pad** noted, "Doc, Patient Tate med is not due to 11-11-95. 24 Oct 60- Dr.

b. Entry dated October 5, 1995 noted, "Wife called for refill Vicodin-early and pt should have 2 refills available."

Although entries for the following prescriptions were found in patient's file, Licensee failed to fully document and enter a complete record of an examination or evaluation including documentation of a diagnosis or medical justification for prescribing the controlled substances or evidence of a good faith examination or medical indication thereof:

| Date | Script# | Drug | Qty |
|---|---|---|---|
| 01/15/96 | 567275 | Percocet | 6 |
| 01/08/96 | 565039 | Vicodin | 60 |
| 11/01/95 | 547372 | Vicodin | 60x3 |
| 10/24/95 | 542542 | Hydrocodone 5mg | 60 |
| 08/16/95 | 148640 | Vicodin | 60 |
| 06/27/95 | 512080 | Hydrocodone 5mg | 60 |
| 03/15/95 | 485894 | Vicodin | 60x1 |
| 03/03/95 | 4405854 | Vicodin | 60x1 |
| 02/03/95 | Pt File | Vicodin | 60x1 |
| 01/04/95 | 4405555 | Vicodin | 60 |

In each instance, Licensee entered into the patient file reference to only the prescription, drug and amount. In each

instance, the file contains no reference to vital signs, observation of the patient's condition, the status of the patient's treatment plan, whether the patient's request for medication is early, and if so, why the patient has failed to comply with Licensee's instructions. Licenses did issued to Patient Tate the following prescriptions for controlled substances with *no* corresponding entry whatsoever in the medical file:

| Date | Script# | Drug | Qty |
|---|---|---|---|
| 11/08/95 | 154350 | Propoxy Nap/100 | 30 |
| 10/11/95 | 539095 | Hydrocodone 5mg | 60 |
| 09/13/95 | 532701 | Hydrocodone 5mg | 60 |
| 09/04/95 | 528862 | Hydrocodone 5mg | 60 |
| 08/21/95 | 4406644 | Vicodin | 60 |
| 08/08/95 | 521936 | Hydrocodone 5mg | 60x1 |
| 07/18/95 | 516829 | Hydrocodone 5mg | 60 |
| 01/25/95 | 471208 | Hydrocodone 5mg | 60 |

Licensee did issue to Patient Tate the following prescriptions for controlled substances at a time when said patient should not have been finished taking the same medication from a prior prescription had the prescription's directions been followed or the correct dosage taken:

| Date | Script# | Drug | Qty | Directions |
|---|---|---|---|---|
| 01/16/96 | 159124 | Vicodin | 60x3 | 1 q6h Prn Pa |
| 11/08/95 | 154350 | Darvocet N100 | 30 | 1 q6h Prn |
| 11/01/95 | 547372 | Vicodin | 60x3 | 1 q6h Prn |

| | | | | |
|---|---|---|---|---|
| 10/24/95 | 542542 | Hydrocodone 5mg | 60 | 1 q6h Prn |
| 10/11/95 | 539095 | Hydrocodone 5mg | 60 | 1 q6h Prn |
| 09/13/95 | 532701 | Hydrocodone 5mg | 60 | 1 q6h Prn |
| 09/04/95 | 528862 | Hydrocodone 5mg | 60 | 1 q6h Prn |
| 08/28/95 | Pt File | Vicodin | 60x2 | - |
| 08/21/95 | 4406644 | Vicodin | 60 | 1 q4-6h Prn |
| 08/16/95 | 148640 | Vicodin | 60 | 1 q4h Prn |
| 08/08/95 | 521936 | Hydrocodone 5mg | 60x1 | 1 q6h |
| 07/18/95 | 516829 | Hydrocodone 5mg | 60 | 1 q6h Prn |
| 06/27/95 | 512080 | Vicodin | 60 | 1 q6h Prn |
| 05/27/95 | 4406277 | Hydrocodone 5mg | 60x1 | 1 q4-6h Prn |
| 03/30/95 | 139677 | Vicodin | 60x2 | 1 q4-6h Prn |
| 03/15/95 | 485894 | Vicodin | 60x1 | 1-2Po q6h |
| 02/03/95 | Pt File | Vicodin | 60x1 | 1q 15 days |
| 02/02/95 | 4405708 | Vicodin | 60x1 | 1 q4-6h Prn |
| 01/11/95 | 466794 | Vicodin | 60 | 1 q4h Prn |

## CONCLUSIONS OF LAW

1.

Based on the Findings of Fact as enumerated above, Licensee is guilty of Counts I, VI and IX as set forth in the Affidavit of Thomas E. Washington, dated June 12, 1996, as a result of Licensee's failure to maintain a complete

record of the examination, evaluation, and treatment, including documentation of the diagnosis and reason for prescribing controlled substances, all in violation of Section IV.E of the Rules and Regulations of the Board, "Pertaining to Prescribing, Administering and Dispensing of Medication," and in violation of Miss. Code Ann. Section 73-25-29(1)(m).

2.

Based on the Findings of Fact as enumerated above, Licensee is guilty of Counts II, IV, VII and X as set forth in the Affidavit of Thomas E. Washington, dated June 12, 1996, as a result of Licensee prescribing a controlled substance or other drug having addiction-forming or addiction-sustaining liability without a good faith examination or medical indication thereof, in violation of Section IV.F of the Rules and Regulations of the Board, "Pertaining to Prescribing, Administering and Dispensing of Medication," and in violation of Miss. Code Ann. Section 73-25-29(1)(m).

3.

Based on the Findings of Fact as enumerated above, Licensee is guilty of Counts III, V, VIII and XI, as set forth in the Affidavit of Thomas E. Washington, dated June 12, 1996, as a result of Licensee prescribing drugs having addiction-forming or addiction-sustaining liability, otherwise than in the course of legitimate professional practice and being guilty of unprofessional conduct, which includes dishonorable or unethical conduct likely to deceive,

defraud or harm the public, in violation of Miss. Code Ann. Sections 73-25-29(1)(c), 73-25-29(1)(h)(iv), and Section 73-25-83(a).

4.

The above Findings of Fact clearly establish that Licensee not only issued numerous prescriptions for controlled substances or other drugs having addiction-forming or addiction-sustaining liability outside the course of legitimate professional practice, but did so at a time when he knew or should have known of possible drug abuse and/or dependency. In the case of Patients Dwight Kee and Jackie Tate, Licensee continued to issue new prescriptions for the same controlled substances at a time when the patient should not have been finished taking the same medication from a prior prescription had Licensee's directions been properly followed or the correct dosage taken. This occurred on 21 occasions for Patient Kee and 19 occasions for Patient Tate. Furthermore, testimony clearly established that Licensee was aware of potential drug problems in each case; Dwight Kee testifying before the Board that he actually discussed his drug problems. To no avail, Licensee continued to prescribe large quantities of controlled substances to said patient. Of equal or greater significance is the fact that both Patients Kee and Tate were described by Licensee as suffering from severe psychiatric disorders, i.e., suicidal ideation. In the case of Patient Kee, psychiatric consultation was not requested until January, 1996. In the case of Patient Tate, psychiatric consultation was never requested.

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In the case of Patient Pricilla Lovelace, Licensee issued numerous prescriptions, i.e., patient receiving an average of 6 to 7 Tylenol #3 per day for approximately one (1) year, all based on a symptomatic diagnosis of fibromyalgia/ back pain, with no effort by Licensee to seek specialty evaluations/consultations and notwithstanding the fact that the patient declined surgery on a number of occasions. As to all four patients, Dwight Kee, Pricilla Lovelace, Jeffrey Gilmore and Jackie Tate, Licensee failed to maintain adequate patient records, i.e., 41% of the prescriptions issued to Kee, 56% of the prescriptions issued to Lovelace, 58% of the prescriptions issued to Tate, and 73% of the prescriptions issued to Gilmore, were either improperly referenced in the patient file or no reference at all was found. Furthermore, no reference is found in either the records for Patients Kee or Tate to the possible suicidal ideation, nor is any reference found relative to Licensee's discussion with Patient Kee of his drug problems. At no time did Licensee refer any of the patients to an expert for a chemical dependency consultation and/or evaluation.

During the hearing, it became apparent that Licensee's failure to maintain proper records and prescribe controlled substances in a proper and prudent manner, was but a small part of a more serious problem, that is, Licensee's inability to manage difficult patients. Every physician in Mississippi must handle difficult patients, and should not assume the role of the "all-caring" doctor. This is especially true with patients suffering from chronic non-malignant pain. The Board does not oppose physicians utilizing opioid therapy for long term treatment of intractable pain. Numerous exhibits were introduced by Licensee presenting the various

guidelines and "Intractable Pain Treatment Acts" adopted in other states including Texas, California, Washington and elsewhere. This Board finds that on June 23, 1992, Licensee received a letter from the Board's then Executive Officer, Frank J. Morgan, Jr., M.D., providing Licensee with recommendations as to Licensee's management of chronic pain patients. All of the recommendations by Dr. Morgan are found in the exhibits supported by Licensee. Notwithstanding, Licensee has failed to comply with the recommendation set forth in the June 23, 1992, letter from Dr. Morgan, and has also failed to meet many of the guidelines supported by his own exhibits.

Finally, it must be noted that the exhibits introduced by Licensee and the testimony of Licensee's expert, Daniel Brookhoff, M.D., establish that there is a legitimate difference of opinion among the experts as to the role of opioid therapy in the management of chronic non-malignant pain. The Board intends by this Order to set the record that the Mississippi State Board of Medical Licensure does not oppose the use of opioid therapy in the management of chronic non-malignant pain. Nonetheless, all doctors must strictly adhere to the rules and regulations of this Board and properly monitor the supply of drugs prescribed, administered and/or dispensed to patients. Had Licensee done so, after being duly warned on June 23, 1992, the disciplinary action taken herein could have been avoided.

**ORDER**

IT IS HEREBY ORDERED, that based upon the Findings of Fact and Conclusions of Law enumerated above,

*Appendix D*

Mississippi Medical License No. 05129, issued to John Wilbur McFadden, Jr., M.D., is suspended for an indefinite period of time, provided however, said suspension shall be automatically stayed subject to the following probationary terms and conditions:

1. Licensee shall not be permitted to order, manufacture, distribute, possess, dispense, administer or prescribe any controlled substances listed in Schedules II, IIN, III, IIIN and IV or any other drugs hereafter placed in said schedules, to any patient on an *out-patient basis* until authorized to do so by prior written order of this Board. Emergency room treatment is permitted under this section, provided, that prior to ordering the administration/dispensation of controlled substances, Licensee shall personally examine the patient and make a determination as to the need thereof. Out-patient prescribing of controlled substances from the emergency room is prohibited. Licensee shall possess full controlled substances privileges in all schedules for hospital in-patient use only. As used herein "hospital in-patient" means actual admission to a hospital or hospital managed out-patient facility. Licensee retains full privileges to administer, dispense, or prescribe controlled substances in Schedule V, with the exception of Buprenex (Buprenorphine) or its generic equivalent.

2. Licensee shall not be permitted to order, manufacture, distribute, possess, dispense, administer, or prescribe the medications Stadol

(Butorphanol Tartrate), Nubain (Nalbuphine), Soma (Carisoprodol), Butalbital, and Dalgan (Dezocine), or their generic equivalents to any patient on an out-patient basis until authorized to do so by written orders of this Board. Licensee shall possess full authority to utilize Stadol and Nubain, or their generic equivalents for hospital in-patient use only. As used herein "hospital in-patient" means actual admission to a hospital or hospital managed out-patient facility. Emergency room treatment is permitted under this section, provided, that prior to ordering the administration/dispensation of Stadol, Soma, Butalbital, Dalgan, and Nubain, Licensee shall personally examine the patient and make a determination as to the need thereof. Out-patient prescribing of Stadol, Soma, Butalbital, Dalgan and Nubain from the emergency room is prohibited.

3. Licensee shall comply with all Federal and State laws governing the practice of medicine and shall comply with the rules and regulations of the Board "Pertaining to Prescribing, Administration and Dispensing of Medication," including, but not limited to:

   a. Licensee shall maintain a complete record of his examination, evaluation and treatment of patients, including documentation of diagnosis and reason for prescribing, dispensing or administering any controlled substances; the name, dose, strength, quantity of the controlled substances and the date the controlled

substances was prescribed, dispensed or administrated.

b. Whenever issuing a prescription for a controlled substance, Licensee shall, in addition to that set forth in sub-paragraph a. above, enter into the patient record the following information:

i) Vital signs, whenever possible.

ii) Status of treatment plan and prognosis.

iii) If the patient is requesting additional medication too early, i.e., has consumed previously prescribed medications (including refills) contrary to Licensee's specific directions, the purpose and reason for the patient's additional request and/or unauthorized dose escalation.

iv) Licensee's observation of the patient.

c. Licensee shall not prescribe, administer, or dispense any controlled substance or other drug having addiction-forming or addiction-sustaining liability without a good faith prior examination and medical indication therefore.

4. Licensee's practice of medicine shall be subject to periodic surveillance by the Mississippi State Board of Medical Licensure. The Board's Executive Officer, any member of the Board or Medical

Consultant appointed by the Board, or investigative staff, may perform a patient chart review of a representative sample of those patients treated by Licensee.

5. During each year of probation, Licensee shall obtain 50 hours of Continuing Medical Education (CME) approved by the American Medical Association, at least fifteen (15) hours of which shall be in the area of addictionology. Following completion of each course, Licensee shall submit to the Board documentary proof of successful completion. During the first year of probation, Licensee shall successfully complete the course entitled, "Physician Education Program in Clinical, Legal and Ethical Issues in Prescribing Abusable Drugs," sponsored by the University of South Florida. All CME credits received by Licensee by virtue of said course shall be applied toward compliance with the 50 hour CME requirement during the first year of probation.

6. Licensee shall obey all federal, state and local laws, and all rules governing the practice of medicine, and shall comply with the rules and regulations of the Board "Pertaining to Prescribing, Administration and Dispensing of Medication." Licensee shall thoroughly familiarize himself with said rules and regulations and shall so indicate to the Board in writing.

7. In the event Licensee should leave Mississippi to reside or to practice outside the State, Licensee

shall, within ten (10) days prior to departing, notify the Board in writing the dates of departure and return. Periods of residency or practice outside Mississippi will not apply to the reduction of time periods specified in this Order.

8. Licensee shall have the right to petition the Mississippi State Board of Medical Licensure for release of any or all of the above enumerated conditions after expiration of five (5) years from the effective day hereof. Thereafter, any right to petition the Board for reconsideration shall be at reasonable intervals, but not less that twelve (12) months from date of last appearance.

IT IS FURTHER ORDERED, that pursuant to Section 73-25-27, a copy of this Determination and Order shall be sent by registered mail or personally served upon John Wilbur McFadden, Jr., M.D. or his attorney. Because Dr. McFadden was informed of this decision following Board deliberation, the order was directed to be given immediate effect.

GIVEN UNDER MY HAND and seal of office, this the 22nd day of November, 1996.

MISSISSIPPI STATE BOARD
OF MEDICAL LICENSURE

BY: s/ Richard L. Peden
RICHARD L. PEDEN, D.O.
PRESIDENT

## APPENDIX E — LETTER OF THE SUPREME COURT AND COURT OF APPEALS, STATE OF MISSISSIPPI DENYING MOTION FOR REHEARING DATED APRIL 15, 1999

**SUPREME COURT AND COURT OF APPEALS**
**STATE OF MISSISSIPPI**
**CHARLOTTE B. WILLIAMS, CLERK**
**THIRD FLOOR GARTIN BUILDING**
**490 HIGH STREET**
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**JACKSON, MISSISSIPPI 39205-0249**
**TELEPHONE: (601) 359-3694**
**FACSIMILE: (601) 359-2407**

Kathy Gillis
Chief Deputy

Bettye Malanchak
Deputy Clerk

April 15,1999

This is to advise you that the Mississippi Supreme Court rendered the following decision on the 15th day of April, 1999.

Supreme Court Case #97-CC-01410-SCT
Trial Court Case #G962601

John Wilbur McFadden, Jr., M.D. v. Mississippi State Board of Medical Licensure

Motion for Rehearing, denied. Prather, C.J., Mills and Cobb, JJ., Not Participating.